TRANSCRIPT OF RECORD

[redacted]

(24,233)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 495.

OLYMPIA MINING & MILLING COMPANY, LIMITED, PLAINTIFF IN ERROR,

vs.

ABNER G. KERNS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

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1 & 2 In the Supreme Court of the State of Idaho.

OLYMPIA MINING & MILLING COMPANY, LIMITED, a Corporation,
Appellant,
vs.
ABNER G. KERNS, Respondent.

Transcript on Appeal.

Appeal from the District Court of the First Judicial District of the State of Idaho in and for Shoshone County.

John P. Gray, E. C. MacDonald, Attorneys for Appellant.
Franklin Pfirman, Attorney for Respondent.

Filed 28 day of Sept. 1912. I. W. Hart, Clerk, by Jno. H. Long, Deputy.

3 In the District Court of the First Judicial District of the State of Idaho in and for the County of Shoshone.

OLYMPIA MINING & MILLING COMPANY, LIMITED, a Corporation,
Plaintiff,
vs.
ABNER G. KERNS, Defendant.

Complaint.

Comes now the plaintiff, and complaining of the above named defendant, respectfully shows to the court and alleges:

I.

That the plaintiff is a corporation duly organized, created and existing under and by virtue of the laws of the State of Idaho, with its principal place of business in the City of Wallace, County of Shoshone, therein.

II.

That the Federal Mining & Smelting Company, hereinafter referred to, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and authorized to hold real estate and transact business within the State of Idaho, by virtue of a due compliance with the laws of said State relating to foreign corporations.

4 III.

That heretofore and on the 28th day of May, 1901, the defendant, Abner G. Kerns, entered into an agreement with Clarence Cunningham in the words and figures following, to-wit:

"This agreement, made and entered into on the 28th day of May, 1901, by and between Clarence Cunningham, party of the first part, and A. G. Kerns, party of the second part, all of the City of Wallace, County of Shoshone, State of Idaho.

Whereas, the estate of Edward T. Elom, deceased, is the owner of an undivided 5/8th of the "Olympia," "Seattle," "Portland," "Olympia Fraction" and "Alice"; and an undivided ½ of the "Darling," "Pacific," "Rose," "Lincoln," and "Diamong Fraction" lode mining claims situated in Placer Center and Leland Mining Districts, in the County of Shoshone, State of Idaho, lying between the Mammoth and Sixteen to One mines, and south of the Custer Mine; and the party of the second part is the owner of the other portions of the said mining claims except the Rose and Lincoln; and

Whereas, the party of the second part as such co-owner has petitioned the probate court for an order for the sale of the interest of the estate of said deceased in said mining claims, and said petition is to be heard on the 3rd day of June 1901, and it is anticipated that an order for the sale of said property will be made; and

Whereas, it is the desire of the parties hereto to purchase the interests of said estate in said properties if the same can be bought for a reasonable sum and upon reasonable terms; for the purpose of consolidating all of the interests therein and forming a mining corporation to prospect, develop and work said mining claims; and

Whereas, the party of the first part is about to leave the State of Idaho, expecting to be absent for a period of two months, more or less, and the sale of said premises may occur during said period.

It is therefore hereby mutually agreed that the party of the second part shall offer to purchase and purchase the interest of the estate of said decedent in said mining claims, if the same can be purchased for the appraised value of said premises, or any less sum; and that the party of the first part will assume and be responsible for the bid and purchase of the party of the second part, and furnish the necessary money to make such purchase at the time when called for by the party of the second part.

And in consideration of the premises and the services to be so rendered by the party of the second part it is further mutually agreed that said party of the second part shall be entitled to one-tenth of all of said mining claims, in which he at present has no ownership.

6 And it is further mutually agreed that upon the formation of the corporation hereinbefore referred to, which corporation is to be formed as soon as practicable after making said purchase, the party of the second part shall have and be entitled to one-tenth

of the stock of said corporation, which stock shall be fully paid up, and non-assessable until after all of the other nine-tenths of the stock have paid ten cents per share to said corporation for the development of said mining claims.

And as a further consideration the party of the second part hereby agrees to do and perform on each of said mining claims the assessment work required for the year 1901, free of expense to the party of the second part.

And as a further stipulation the party of the second part agrees to convey to the party of the first part, or his assigns, all his rights, title and interest in said mining claims for the sum of five thousand dollars to be paid upon completion of the purchase of the interest of said estate in the premises or sooner.

Witness our hands and seals this 28th day of May, 1901.

CLARENCE CUNNINGHAM.
A. G. KERNS."

That the said agreement was prepared, composed and drawn by the defendant who then was and now is an attorney and counsellor duly admitted to practice as such in all of the Courts
7 of the State of Idaho.

IV.

That pursuant to the agreement referred to, the defendant did prosecute his said petition addressed to the Probate Court of Soshone County, Idaho, asking for a sale of the mining interests belonging to the estate of the said Edward T. Elom, deceased, and did cause to be made on the 3rd day of June, 1901, an order of the said Court directing the sale thereof. That thereafter, and on the 20th day of May, 1901, the defendant did purchase at public sale the said interests for which he did bid the sum of twenty five hundred ($2,500.00) dollars, of which five hundred ($500.00) dollars was paid in cash and the remaining portion thereof, to-wit: two thousand ($2,000.00) dollars was secured by a mortgage upon said mining interests due and payable within one year from the date thereof or as soon as the said mining claims could be entered for patent; the defendant agreeing to proceed with diligence to prosecute an application for patent for the said mining interests, except for the Rose and Lincoln lode claims, and to make entry thereof as soon as the expiration of the period of publication. And the said sale of the said mining interests, according to the terms of the said bid of defendant was confirmed on the 13th day of August, 1901, by the Probate Court of Shoshone County, Idaho.

V.

8 That pursuant to the agreement hereinbefore set forth the said Clarence Cunningham did thereafter enter into possession of the said mining claims and did cause a large number of persons to associate themselves together for the purpose of expending money in the development thereof and for organizing a corporation for the purpose of acquiring a title thereto and developing and work-

ing said claims. That pursuant to the said agreement, the said Clarence Cunningham representing himself and his associates, did expend, approximately, the sum of twenty-six thousand ($26,000.00) dollars in developing and working the said mining claims, and the said Clarence Cunningham for himself and his associates, did subsequent to the 29th day of May, 1901, pay to the defendant the sum of four thousand one hundred ($4,100.00) dollars, one thousand three hundred and fifty ($1,350.00) dollars on August 15, 1901; five hundred ($500.00) dollars on September 16, 1901; five hundred ($500.00) dollars on November 14, 1901; five hundred ($500.00) dollars on February 28, 1902; one thousand ($1,000.00) dollars on April 3, 1902; and two hundred and fifty ($250.00) dollars on July 6, 1902, on account of the payment of the five thousand ($5,000.00) dollars due to the defendant under the agreement aforesaid, which, together with one-tenth of all of the said mining claims, or upon the formation of the corporation therein referred to, one-tenth of the capital stock of said corporation,
9 which stock was to be fully paid up and non-assessable until after all of the other nine-tenths of the stock had paid ten cents per share to the said corporation for the development of the said mining claims, was the consideration to be paid to the defendant, for the interests held by him and to be secured by him in the said mining claims, and for the services to be rendered by him, as attorney, in securing patents therefor. That such money so expended was furnished by Clarence Cunningham and his associates, the predecessors in interest, organizers and stockholders of this plaintiff.

That pursuant to the agreement hereinbefore referred to, the defendant did, on the 20th day of July, 1901, as hereinbefore alleged, bid upon the said mining interests belonging to the estate of Edward T. Elom, deceased, and did pay the said sum of five hundred ($500.00) dollars upon said bid. That the said sum of five hundred ($500.00) dollars was furnished to the defendant by Clarence Cunningham and his associates, the predecessors in interest, organizers and stockholders of this plaintiff, according to the terms of the said agreement for the purpose of making the said payment. That after confirmation, the administrator made, executed and delivered a deed for the said mining interests belonging to the estate of Edward T. Elom, deceased, to the defendant and the defendant did make, execute and deliver to the administrator of the estate of the said Edward T. Elom, deceased, a mortgage upon said mining
10 interests to secure the payment of the balance due under the said bid. That the defendant took the said deed from the administrator and title to the said mining interests in trust for the corporation provided to be formed under the agreement hereinbefore referred to. That it was understood and agreed by and between the defendant and Clarence Cunningham and his associates that their successor in interest, the corporation to be formed, would furnish the additional money necessary to pay for the said interest and to pay the said mortgage when it became necessary to pay the same in order to protect the said trust estate.

VII.

That after the purchase at administrator's sale by the defendants of the mining interests belonging to the estate of Edward T. Elom, deceased, and after receiving said deed and on the 17th day of August, 1901, he duly made, executed and delivered a declaration of trust, a copy of which is hereto attached marked Exhibit "A" and made a part hereof as fully as if set out in hæc verba.

That thereafter the defendant in his own name but in fact as trustee and agent for the corporation provided to be formed in the said agreement and declaration of trust, applied for United States patent for the said Olympia, Portland, Seattle, Alice, Olympia Fraction, Darling, Pacific and Diamond Fraction lode mining
11 claims. That the defendant in applying for said patents acted not only as trustee for the said corporation to be formed under the terms of said agreement and declaration of trust, but was also acting as the agent and attorney for the said corporation and the parties organizing the same; that the said parties, Clarence Cunningham and others, organizers of said corporation, furnished and paid all the expenses of said application for patent.

VIII.

That said Clarence Cunningham and his associates, by and with the full consent and without objection on the part of the defendant and under the terms of the said agreement and declaration of trust, continued to expend money in the development of the said mining claims up to and until on or about the first day of March, 1903.

IX.

That on or about the 20th day of March, 1903, and pursuant to the terms of said agreement and declaration of trust, the said Clarence Cunningham and his associates acting in good faith, and endeavoring to carry out the terms and stipulations of said agreement and declaration of trust, caused to be organized under the laws of the State of Washington, a corporation named Olympia Mining Company.

That the defendant at the time of the organization of said corporation agreed, consented to, acquiesced, concurred therein and made no objection thereto; but on the contrary previously and in
12 February 1901, subscribed for a portion of the capital stock of the same, knowing at the time that such corporation was to be thereafter organized under the laws of the State of Washington; and agreed to pay therefor the sum of one thousand dollars, that the defendant at the time he subscribed for said stock in said corporation paid part of the purchase price therefor, to-wit: fifty ($50.00) Dollars.

That thereafter the said corporation duly complied with all of the laws of the State of Idaho, authorizing it to hold mining claims and transact business generally in the said State of Idaho.

X.

That in the year 1903, on account of the large expenditures made by the incorporators in the development and patenting of the said mining claims and in the payments made to the defendant Kerns, there was not sufficient money in the treasury of the Company to pay the said mortgage; that Clarence Cunningham, who had the management of the affairs of himself and his associates with reference to the development of the mining claims hereinbefore described, being about to leave for a trip, entered into an agreement and arrangement for and on behalf of himself and his associates, with J. G. Cunningham, F. Cushing Moore and Francis Jenkins (who were associates of the said Cunningham and who contributed moneys for the purposes aforesaid), that in case payment of
13 said mortgage should be insisted upon that they would advance the money for the payment of the same; and having made such arrangements the said Clarence Cunningham, acting for himself and his associates, notified the defendant of the said arrangement, and directed him that in case payment of the mortgage should be insisted upon to call upon the said J. G. Cunningham, F. Cushing Moore and Francis Jenkins for the money to make the payment of the mortgage, and that the said defendant promised and agreed that he would comply with the said direction.

XI.

That on or about the first day of June, 1903, Anna Conner, as administratrix of the estate of Edward T. Elom, deceased, commenced an action to foreclose said mortgage against the defendant. That defendant did not notify Clarence Cunningham and did not notify the said J. G. Cunningham, F. Cushing Moore or Francis Jenkins, or either of them, of said foreclosure proceedings. But the defendant permitted a decree and judgment of foreclosure to be entered upon the 28th day of July, 1903, directing the sale of the said mining claims to pay said mortgage.

XII.

That the 24th day of August, 1903, was fixed as the date of sale under said judgment and decree of foreclosure. That said J. G. Cunningham, having in the meantime learned of the said decree, for the purpose of protecting Clarence Cunning-
14 ham and his associates, and according to his agreement hereinbefore referred to, did advance the moneys for the plaintiff in said suit to bid in the said property at the said sale, and did bid in the same in his own name, but for the benefit of the said Clarence Cunningham and his associates and the corporation to be formed under the terms of said agreement, and received the Sheriff's Certificate of Sale, receiving the same and holding the same in trust to be assigned and transferred to the said Clarence Cunningham and his associates upon repayment of the said amount to be paid by him, all of which was then well known to the defendant.

XIII.

That thereafter and on the 18th day of August, 1904, the defendant in violation of his said trust with intent to cheat and defraud the plaintiff, and in violation of the confidence reposed in him as attorney for the plaintiff, sold and conveyed to one William J. Hall and individed one-fourth interest in said mining claims, and received therefor the sum of thirty three hundred ($3300.00) dollars, and that with the said money he redeemed said property from said Sheriff's sale, by paying to the sheriff of the County of Shoshone, State of Idaho, the amount for which the said property had been sold, with interest and costs, and at the time of selling and conveying said undivided one-fourth interest, the defendant entered into an agreement with said William J. Hall, to sell and
15 convey to him the remaining interests in said claims. That neither said Olympia Mining Company nor any of its officers or stockholders nor said Clarence Cunningham or any of his associates knew of such transfer and conveyance until the month of November, 1904. That the first knowledge of such fact obtained by any of said persons, was in said month received by said Clarence Cunningham, and was the first time that any of said persons knew that the defendant had repudiated his said trust and claimed to hold said mining claims as his own and adversely to said persons.

XIV.

That at the time of said sale and conveyance of said undivided one-fourth interest to William J. Hall, and the making of the said agreement to convey the remainder of the property to him the said William J. Hall well knew that the said property in equity belonged to the plaintiff, and well knew that the defendant held the legal title thereof in trust for the plaintiff, and had no right to sell or convey the same. That said William J. Hall purchased the said one-fourth interest and also entered into said agreement for the purchase of the remainder thereof from said Kerns with full knowledge and notice of the rights of the plaintiff in the premises.

XV.

Plaintiff further alleges that the said William J. Hall, at
16 the time of purchasing said one-fourth interest and at the time of entering into said agreement with said defendant Kerns for the purchase of the remaining interest of the said mining claims, was acting as the agent of the Federal Mining & Smelting Company who furnished the money which was paid the defendant and that the said Federal Mining & Smelting Company at the time of advancing the said money for said purchase, and at the time said agreement between said Kerns and Hall was entered into, well knew that the defendant held the said property as trustee as hereinbefore stated, and that he had no right in law or equity to sell the same.

That previous to the commencement of this action the said Fed-

eral Mining & Smelting Co., reconveyed all its title to said property to defendant and it, as well as said Hall, now disclaims any interest thereto.

XVI.

That on the 20th day of May, 1905, the said Olympia Mining Company did demand of the defendant a deed transferring all of the Olympia, Portland, Seattle, Alice, Olympia Fraction, Darling, Pacific and Diamond Fraction and an undivided one-half of the Rose and Lincoln lode claims, and did tender to the defendant $900.00 in gold coin of the United States of America, to-wit, gold twenty dollar pieces, and at the same time tendered to the defendant a certificate No. 20 for 100,000 shares of the capital stock of the
17 Olympia Mining Company, which said certificate of stock was issued and was paid up to the amount of 10 cents per share, for all that was due to him under the original contract, between Clarence Cunningham and Abner G. Kerns and for his services as an attorney rendered in securing the titles and patenting the said mining claims; that such refusal to execute and deliver deed or conveyance was the first time that the defendant Kerns directly repudiated his said trust to said Olympia Mining Company, or to any of its officers or stockholders or to said Clarence Cunningham, and was the first time that said Kerns directly to said persons, claimed to own such mining claims adversely to them, and was the first actual notice thereof received directly by them from the defendant that said corporation in good faith and for the purpose of securing and protecting its rights under and by virtue of said agreement and declaration of trust, did on or about the 29th day of May, 1905, commence an action in the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, by filing a complaint therein and procuring the issuance and service of summons upon the defendants therein, to-wit: upon Abner G. Kerns and William J. Hall, and the Federal Mining and Smelting Company, a corporation each of whom claimed to have some interest in and to the property described in said agreement and declaration of trust, to enforce specific performance of said agreement and said
18 declaration of trust.

XVII.

That in said action the defendants appeared and the suit was diligently and in good faith prosecuted by the plaintiff, that judgment was duly made and given in favor of said plaintiff as prayed for, from which judgment the said defendants, and each of them, appealed to the Supreme Court of the State of Idaho; that said cause was duly submitted to the Supreme Court of the State of Idaho at the October term of the year 1906, and the judgment of the District Court was affirmed; that a copy of said opinion is hereto attached marked Exhibit "B" and made a part hereof; that a rehearing was thereafter granted by the said court, and the former decision therein rendered was overruled on the 18th day of June, 1907, and the cause

remanded to the said District Court for further proceedings; that a copy of such opinion is hereto attached marked Exhibit "C" and made a part hereof.

XVIII.

That thereafter said cause coming on for hearing in the District Court aforesaid, the court on the 20th day of April, 1908, made and entered the judgment and decree as follows (Omitting the title of court and cause):

"This cause coming on regularly to be heard before the Court without a jury on the 20th day of April, 1908, upon the remitt-ur from the Supreme Court of the State of Idaho, filed herein on
19 August —, 1907, and the pleadings, the plaintiff appearing by its attorneys, Mr. E. C. Macdonald and Mr. A. E. Mayhew, and the defendant, A. G. Kerns, appearing by his attorneys Mr. J. H. Forney and Mr. J. A. Wayne, and the defendants, the Federal Mining & Smelting Company and William J. Hall not appearing, whereupon it appeared to this Court that by the judgment of the Supreme Court it was decreed that the plaintiff could not maintain this action.

Therefore, it is hereby ordered, adjudged and decreed that this action be and the same is hereby dismissed and that the defendants have and recover of and from the plaintiff their costs herein taxed at the sum of $38.80."

Done and rendered this 21st day of April, 1908.

WILLIAM W. WOODS, *Judge.*"

XIX.

That thereafter the plaintiff in said action appealed from said last mentioned judgment and decree to the Supreme Court of the State of Idaho, and upon said appeal such proceedings were had and done as that on the 14th day of November, 1908, the last mentioned Court entered its order dismissing said appeal upon the following grounds set forth in its opinion, to-wit:

"This case was here on a former appeal, 13 Idaho, 514; 91 Pac. 92. In the opinion rendered in that case this court said:
20 'Under the provisions of the contract, Kerns had a right to insist on the organization of such corporation under the laws of the State of Idaho. That being the conclusion we have reached after a careful consideration of this case on the petition and arguments on the re-hearing, the decision of that question ends this case; for, until a corporation is organized in compliance with the provisions of said contract, neither Cunningham nor the respondent corporation can enforce the provisions of said contract against Kerns. Until a corporation has been organized under the provisions of the contract and has fully complied with the terms and provisions of said contract, the contract cannot be enforced against Kerns. As that is the controlling question in this case, it is not worth while for us to consider the other questions raised.' Upon the remitt-ur going

down, the cause was called for trial by consent of the parties. No amendment was made or offered to the complaint. The plaintiff, a Washington corporation, still remained the plaintiff. The issues presented to the trial court after reversal were the same as at the former trial. The plaintiff, however, offered to produce further proof, and the court announced that no further proof could be introduced by plaintiff under the Supreme Court decision, for the reason that under no circumstances could the action be maintained, and made an order refusing to admit such proof. Afterward
21 the court entered judgment for the defendant dismissing said action and for costs This appeal is from the judgment of dismissal.

In this courtt the respondent moves to dismiss as — the appeal and, among other grounds, assigns 'That the case was once decided by this court, and that that decision was final.' Upon the former appeal this court held that the plaintiff, a Washington corporation, could not maintain the action. The evidence offered by the appellant and rejected by the court is not made a part of the judgment roll by a bill of exceptions, and for that reason cannot be reviewed upon an appeal from the judgment. This, then, leaves the case here upon the judgment roll consisting of the same pleadings as were presented to this court upon the former appeal. The plaintiff is the same Washington corporation, and cannot maintain this action, as held in the former opinion. The trial court was justified in holding that the plaintiff could not maintain the action, and in dismissing the same. Every question presented upon this appeal was presented to this court upon the former appeal, and finally decided and determined by the decision rendered in that case.

The motion to dismiss the appeal will be sustained. Costs awarded to the respondent."

XX.

That on or about the 5th day of April, 1909, pursuant to the terms of said agreement and declaration of trust and for the
22 purpose of lawfully carrying into effect the terms and conditions of said agreement and declaration of trust, Clarence Cunningham and his associates, acting under and in pursuance of said agreement and said declaration of trust, caused to be organized a corporation under the laws of the State of Idaho, with a capital stock of one million ($1,000,000) dollars divided into one million (1,000,000) shares of the par value of one ($1.00) dollar each. That the defendant was duly notified of the said organization, and previous thereto was invited and requested by Clarence Cunningham on behalf of himself and his associates to participate in said organization and to become a member of the Board of Directors, to take part in the adoption of a code of by-laws, and generally to participate in the management of the affairs of the corporation, which the defendant has at all times without reason, failed, neglected and refused to do, although the said Kerns was designated in the Articles of Incorporation of plaintiff as one of its seven directors. That plaintiff is now authorized by law to take, hold and convey real estate, to

prospect, develop and work mining claims, to transact the business of mining, with all incidental powers thereto, within the State of Idaho; that said corporation was created in strict conformity with the terms and conditions of said agreement and the subsequent agreements between the said Clarence Cunningham, his associates and the said A. G. Kerns.

23

XXI.

That on the 16th day of January, 1909, the defendant in violation of his said trust and with intent to cheat and defraud the plaintiff herein, sold and conveyed by quit claim deed to *the* one Jerome L. Day, all of his right, title and interest in the "Olympia," "Olympia Fraction," "Seattle," "Portland," "Alice," "Darling," "Diamond Fraction," and "Pacific" mining claims above described.

XXII.

That at the time of said sale and conveyance of said property, the said Jerome L. Day, well knew that the said property in equity belonged to the plaintiff herein and well knew that the defendant held the legal title thereto in trust for this plaintiff and had no legal right to sell the same; that the said Day purchased said property with full knowledge and notice of the rights of the plaintiff in the premises. But that said Day has reconveyed said property to defendant and now disclaims any interest thereto.

XXIII.

That in making the deeds and entering into the said contract the said defendant, Abner G. Kerns, violated the trust of the plaintiff and the trust and confidence reposed in him as attorney for the plaintiff and its predecessors and the said acts of the said A. G. Kerns in making the said deeds and entering into said contract were in
24 defiance of common honesty and in violation of all his trust relations for the sole and simple purpose of defrauding the plaintiff and securing for himself an additional sum of money.

XXIV.

That on the — day of April, 1909, the plaintiff demanded of the said A. G. Kerns, a deed transferring all of the Olympia, Portland, Seattle, Alice, Olympia Fraction, Darling, Pacific and Diamond Fraction, and an undivided one-half of the Rose and Lincoln lode claims, and did tender to the said A. G. Kerns the sum of fourteen hundred and five dollars in gold coin of the United States, together with interest thereon to the date of tender, and at the same time tendered to the said A. G. Kerns Certificate No. eleven for one hundred thousand (100,000) shares of the capital stock of the said Olympia Mining & Milling Company, Limited, which said certificate of stock was duly issued by authority of said corporation and which said stock was fully paid up and non-assessable until after all of the other nine-tenths of the stock of this corporation shall have paid ten (10)

cents per share to the said corporation for the development of the mining claims described which fact was endorsed thereon in the following words, to-wit:

"This stock is fully paid up and non-assessable until after all of the other nine-tenths (9/10) of the stock of the Olympia Mining and Milling Company, Limited, shall have paid ten cents per share to said corporation for the development of its mining claims."

For all due him under the original contract between Clarence Cunningham and A. G. Kerns and for his services as attorney rendered in securing the titles and obtaining the said Mining claims, and that the plaintiff has been at all times since, and now is, ready and willing to make said payment to the said A. G. Kerns upon his complying fully with the conditions of his said contract.

That the property herein described has not changed in condition or value since the year 1903; that the plaintiff herein has heretofore offered to pay unto the defendant, any and all moneys which he may have paid for, advanced or disbursed for on account of said properties, or for the benefit thereof, and hereby again offers so to do. The plaintiff here again offers to do equity unto said defendant as to the court may seem just and right, and hereby offers to reimburse the defendants, and each of them, principal and interest, for any and all advancements or disbursements made on any and every account of or for the benefit of the said mining claims.

That the property hereinbefore described consists of mining claims which are of an uncertain and speculative value. That plaintiff believes them to be of great value, but that in order to demonstrate their value, if any they have, large sums of money must be expended to prospect and devolop them, which money plaintiff has and is anxious and willing to so expend. That by reason of these facts plaintiff has inadequate remedy at law.

Wherefore plaintiff prays that the Court decree:

1.

That defendant, Abner G. Kerns, at all times since the 28th day of May, 1901, was and is the trustee and agent and attorney of this plaintiff, and that the plaintiff be decreed to have been at all times the owner of equity of said premises and entitled to receive a deed therefor from said Abner G. Kerns upon the delivery to him of one hundred thousand shares of stock of the Olympia Mining and Milling Company, Limited, fully paid up and non-assessable until after all of the other nine-tenths of the stock have paid 10 cents per share to said corporation for the development of said mining claims; that he be compelled to convey to the plaintiff by a good and sufficient deed and title *to* the said Olympia, Portland, Seattle, Alice, Olympia Fraction, Darling, Pacific and Diamond Fraction lode mining claims, and *to* an undivided one-half interest of, to and in the Rose and Lincoln Lode Mining claims, all situated in Placer Center Mining District County of Shoshone, State of Idaho.

2.

That the Plaintiffs have such other and further relief in
27 the premises as to the court may seem just and equitable and that the plaintiff have and recover costs herein.

A. E. MAYHEW,
Wallace, Ida.;
E. C. MacDONALD,
Attorney- for Plaintiff.

Duly verified.

EXHIBIT "A."

Declaration of Trust.

I, A. G. Kerns of the City of Wallace, County of Shoshone, State of Idaho, do hereby declare and acknowledge that I hold the legal title to the following interests in certain mining claims in trust for the use and benefit of a corporation to be hereafter formed and to be named the Olympia Mining Company, provided Clarence Cunningham, of the City of Wallace, in the County of Shoshone, State of Idaho, or the said corporation shall comply with the provisions of an agreement in writing dated the 28th day of May, 1901, between the said Clarence Cunningham and the said A. G. Kerns.

The said mining premises being particularly described as follows, to-wit:

The "Olympia" lode mining claim.
The "Portland" lode mining claim.
The "Seattle" lode mining claim.
The "Alice" lode mining claim.
28 The "Olympia Fraction" lode mining claim.
The "Darling" lode mining claim.
The "Pacific" lode mining claim.
The "Diamond Fraction" lode mining claim.
One half of the "Rose" lode mining claim.
One half of the "Lincoln lode mining claim.

All situated on the divide between Canyon Creek and the East Fork of Nine Mile Creek in Placer Center and Leland Mining District, County of Shoshone, State of Idaho.

Dated this 17th day of August, 1901.

Witness my hand and seal.

[SEAL.] A. G. KERNS.

COUNTY OF SHOSHONE,
State of Idaho, ss:

On this 17th day of August, A. D. 1901, before me, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, personally appeared A. G. Kerns, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in Wallace, Idaho, the day and year in this certificate first above written.

[SEAL.] HORACE M. DAVENPORT,
Clerk of the District Court of the First Judicial District of the State of Idaho in and for Shoshone County,
29 By CHAS. A. ERVIN, *Deputy.*

Duly verified.

File- May 29th, 1905.

EXHIBIT "B."

In the Supreme Court of the State of Idaho, October Term, 1906.

Filed December 13th, 1906. Ola Johanesse, Clerk.

OLYMPIA MINING COMPANY, Respondent,
vs.
ABNER G. KERNS et al., Appellant-.

Contract—Purchase on Interests in Mining Claims—Unilateral Contract—Option—Enforcement of Contract—Substantial Conflict in Evidence—Time Not of Essence Contract—Organization of Corporation—Payments Due.

1. Where a contract is entered into for the purpose of obtaining title to several mining claims with the view of organizing a corporation to take such title, and develop said claims and it is stipulated between the parties that K shall procure the sale of certain interests belonging to the estate of a deceased person, and purchase the same at such sale, and that C would furnish the money to pay the
30 purchase price therefor, such agreement does not leave it optional with C whether he will pay K the amount of the purchase price or not. After K had purchased such interest according to the contract, C was obligated and bound to pay the purchase price thereof.

2. After K had made the purchase of said interests and after he had performed the services agreed to be performed by him under the terms of said contract, he became the equitable owner of a one-tenth interest in all of said mining claims in which he, at the time he executed the said contract, had no interest, and could not maintain an action to recover such interest or the stock representing such interest.

3. Held that said contract is not unilateral and is not an option on the part of C, but was such a contract as might be enforced by K after he had performed his part thereof.

4. Under the terms of said contract C agreed to pay the purchase price of the Elom estate interests in said mining claims after K had purchased the same. After K had purchased the same C was bound to pay the price.

5. After K had performed his part of said contract C became obligated and bound to perform his part thereof, and in case he failed to do so K had his remedy by an action against him, as it was not optional with C whether he performed his part after K had purchased his.

6. Where there is a substantial conflict in the evidence upon the material issues in an action, this court will not, on appeal,
31 disturb the decision of the trial court.

7. Held, that time is not of the essence of the contract sued on in this action.

8. The stipulation in said contract whereby a corporation was to be organized for the purpose of consolidating all the interests in said mining claims and developing them, and it is not stipulated that such corporation must be formed under the laws of any particular state, it is a sufficient compliance with the terms of said contract if the corporation is formed under the laws of the State of Washington, and so complied with, the laws of Idaho has to have all of the privileges and rights of a domestic corporation.

9. K owned an undivided interest in said mining claims and it was a part of the plan contemplated by himself and C for him to sell and C to buy for the uses of the corporation to be formed, such interest, that stipulation must be considered in connection with the whole contract in determining whether time was of the essence of such stipulation, and where K had received and accepted payments on the gross sum that he was to receive for his said interests, long after the payment became due, time will not be considered as of the essence of such stipulation.

10. It is apparent that the objection, aim and purpose of said contract was to consolidate all of the outstanding interests in and
32 to said mining claims, and to organize a corporation for the purpose of taking over, working and developing the same, and in determining whether time was of the essence of said contract or not, or any stipulation in it, all of the provisions of said contract must be taken into consideration and the contract construed as a whole.

(*Syllabus by the Court.*)

Appeal from the district court of Shoshone County. Hon. Ralph T. Morgan, Judge.

An action to enforce specific performance of a contract. Judgment for the plaintiff. Affirmed.

J. H. Forney and John P. Gray for Appellants.

A. E. Mayhew and E. C. Macdonald for Respondent.

SULLIVAN, *J.:*

This action was commenced by the Olympia Mining Company, a corporation, as plaintiff, against Abner G. Kerns, William J. Hall and the Federal Mining & Smelting Company, a corporation, as de-

fendants, for the purpose of having the plaintiff corporation declared the equitable owner of an undivided three-fourths interest in the Olympia, Portland, Seattle, Alice, Olympia Fraction, Pacific, Darling, Diamond Fraction, and an undivided one-fourth interest in the Rose and Lincoln Lode Mining Claims, all situated along Nine Mile Creek in Placer Center and Lelands Mining Districts, Shoshone County, and to compel the appellant Kerns to convey to the plaintiff corporation by good and sufficient deed an undivided three-
33 fourths interest in and to said mining claims upon the payment to him of $900, with interest, and upon delivery to him of one hundred thousand shares of the capital stock of the plaintiff corporation, paid up to the amount of ten cents per share, and to compel the defendant the Federal Mining & Smelting Company, to convey to the plaintiff an undivided one-fourth interest to each of said mining claims upon the payment to it of $3,300 with interest thereon.

This action is based upon the following contract or agreement, to-wit:

"This agreement made and entered into on this 28th day of May, 1901, by and between Clarence Cunningham, party of the first part, and A. G. Kerns, party of the second part, all of the City of Wallace, County of Shoshone, State of Idaho, witnesseth:

"Whereas, the estate of Edward T. Elom, deceased, is the owner of an undivided ⅝th of the "Olympia", "Seattle", "Portland", "Olympia Fraction" and "Alice", and an undivided one-half of the "Darling," "Rose", "Lincoln", and "Diamond Fraction" lode mining claims situated in the Placer Center and Leland Mining Districts, in the County of Shoshone, State of Idaho, lying between the Mammoth and Sixteen to One mines, and south of the Custer mine, and the party of the second part is the owner of the other portions of the said mining claims except the Rose and Lincoln; and
34 Whereas, the party of the second part as such co-owner has petitioned the probate court for an order of sale of the interest of the estate of said deceased in said mining claims, and said petition is to be heard on the 3rd day of June, 1901, and it is anticipated that an order for the sale of said property will be made; and

Whereas, it is the desire of the parties hereto to purchase the interests of said estate in said properties if the same can be bought for a reasonable sum and upon reasonable terms, for the purpose of consolidating all of the interests therein, and forming a mining corporation to prospect, develop and work said mining claims; and

Whereas, the party of the first part is about to leave the State of Idaho, expecting to be absent for a period of two months more or less, and the sale of said premises may occur during said period.

It is therefore mutually agreed that the party of the second part shall offer to purchase and purchase the interest of the estate of said decedent in said mining claims, if the same can be purchased for the appraised value of said premises or any less sum; and that the party of the first part will assume and be responsible for the bid and purchase of the party of the second part, and furnish the neces-

sary money to make such purchase at the time when called for by the party of the second part.

35 And in consideration of the premises and the services to be so rendered by the party of the second part it is further mutually agreed that said party of the second part shall be entitled to one-tenth of all of said mining claims, in which he at present has no ownership.

And it is further mutually agreed that upon the formation of the corporation hereinbefore referred to, which corporation is to be formed as soon as practicable after making said purchase, the party of the second part shall have and be entitled to one-tenth of the stock of said corporation, which stock shall be fully paid up, and non-assessable until after all of the other nine-tenths of the stock have paid ten cents per share to said corporation for the development of said mining claims.

And as a further consideration the party of the first part hereby agrees to do and perform on each of said mining claims the assessment work required for the year 1901, free of expense to the party of the second part.

And as a further stipulation the party of the second part agrees to convey to the party of the first part or his assigns, all his right, title and interest in said mining claims for the sum of five thousand dollars to be paid upon completion of the purchase of the interest of said estate in the premises or sooner.

Witness our hands and seals this 26th day of May, 1901.

36 CLARENCE CUNNINGHAM.
A. G. KERNS."

It is alleged in the complaint that pursuant to said agreement the defendant Kerns did prosecute a proceeding in the probate court asking for a sale of the interest of Edward T. Elom, deceased, in and to said mining claims, and procured an order from said court on the third day of June, 1901, directing the sale thereof; that thereafter on the 20th day of July, said Kerns did purchase at public sale the said interest for the sum of $2,500 of which $500 was paid in cash, and the remaining portion $2,000 was secured by mortgage upon said mining interests due and payable within one year from the date thereof, and that said sale was confirmed thereafter by said Court; that thereafter pursuant to said agreement, Clarence Cunningham, the first party, to said agreement, representing himself and his associates, did expend approximately the sum of $25,000 in developing and working the said claims, and they did pay the said Kerns $4,100 on account of the payment of the $5,000 due said Kerns under said agreement, together with one-tenth of all of said mining claims upon the formation of the corporation referred to in said contract, which interest was represented by one hundred thousand shares of the Capital stock of plaintiff, which stock was to be fully paid up and non-assessable until after the other nine-tenths of the stock had paid ten cents per share to said

37 corporation for the development of said mining claims, which was the consideration paid for the interests held by

Kerns in said mining claims and for services to be rendered by him in securing patents therefor; that the sum of $500, the first payment of the purchase price of said Elom's interest, was paid to said Kerns by the said Cunningham and his associates; that after the confirmation of said sale the administratrix of the estate of the said Elom, deceased, executed and delivered a deed to said mining interests belonging to the estate of the said Elom, to said Kerns grantee, and that said Kerns made and executed to said administratrix of said estate, a mortgage upon said mining interests to secure the payment of the balance due therefor; that said Kerns took the title to said mining interests in trust for the corporation provided to be formed under the terms of said agreement; that it was understood and agreed between said Kerns and the said Cunningham and his associates that their successor in interest, the corporation to be formed, would furnish the additional money necessary to pay for the said interests and to pay the said mortgage when it became necessary to pay the same in order to protect said trust estate; that after the purchase of said Elom's interest as aforesaid, and after receiving deed therefor, said Kerns did make, execute and deliver a declaration of trust as follows:

"I, A. G. Kerns of the City of Wallace, County of Sho-
38 shone, State of Idaho, do hereby declare and acknowledge that I hold the legal title to the following interests in certain mining claims in trust for the use and benefit of a corporation to be hereafter formed and to be named the Olympia Mining Company, provided Clarence Cunningham of the City of Wallace, in the County of Shoshone, State of Idaho, or the said corporation shall comply with the provisions of an agreement in writing dated the 28th day of May, 1901, between the said Clarence Cunningham and the said A. G. Kerns.

The said mining premises being particularly described as follows, to-wit:

The "Olympia" lode mining claim.
The "Portland" lode mining claim.
The "Seattle" lode mining claim.
The "Alice" lode mining claim.
The "Olympia Fraction" lode mining claim.
The "Darling" lode mining claim.
The "Pacific" lode mining claim.
The "Diamond Fraction" lode mining claim.
One half of the "Rose" lode mining claim.
One half of the "Lincoln" lode mining claim.

All situated on the divide between Canyon Creek and the East Fork of Nine Mile Creek in Placer Center and Leland Mining District, County of Shoshone, State of Idaho.

Dated this 17th day of August, 1901.

39 Witness my hand and seal.

[SEAL.] A. G. KERNS."

That thereafter said Kerns in his own name and in fact as trustee for said contemplated corporation, applied for United States patents

for a part of said mining claims; that in applying for said patents the said Kerns acted on as trustee for said corporation to be formed under the terms of said agreement and declaration of trust; that he was also acting as agent and attorney for said corporation, and the parties organizing the same, and that said parties furnished and paid all the necessary expenses of said application for patent; that said Cunningham and his associates by and with the full consent of the said Kerns and under the terms of said agreement and declaration of trust, continued to expend money in the development of said mining claims up to and until about the first day of March, 1903, pursuant to said agreement, and the said Cunningham and his associates acting in pursuance of said agreement and declaration of trust, caused to be organized the plaintiff corporation under the laws of the State of Washington, with a capital of $1,000,000 divided into one million shares of the par value of $1.00 each; that said Kerns was notified of said organization and acquiesced in and concurred therein and agreed to the same, and made no objection thereto; that thereafter said corporation duly complied with
40 all the laws of the State of Idaho authorizing it to hold mining claims and prosecute business in said state, and that it is now authorized to take and hold and convey real estate and to do business in said state; that in the year 1903, after the organization of the plaintiff company, on account of large expenditures made by the incorporators in the development of said mining claims and in the payments made to said Kerns by the plaintiff corporation, there was not sufficient money in the treasury of said company to pay said mortgage and that said Cunningham who had the management of the affairs of the company, was about to leave for a trip to *leave for a trip to* Alaska, entered into an arrangement for and on behalf of the plaintiff corporation with J. G. Cunningham, vice-president, of the company, and F. Cushing Moore and Francis Jenkins, stockholders of the company, that in case payment of said mortgage should be insisted upon, they would advance the money for the company to pay the same, and notified said Kerns of such arrangement and directed him that in case payment should be insisted upon he should call upon said parties for the money to pay said mortgage and that Kerns promised to do so; that on or about the first day of June, 1903, the administratrix of the estate of the said Elom, deceased, did commence an action to foreclose said mortgage; that said Kerns did not notify the plaintiff corporation nor the said Cunningham, nor any of the officers or stockholders of the said company, but permitted a decree and
41 judgment of foreclosure to be entered directing the sale of said mining claims to pay said mortgage; that the date of said sale was fixed and the said J. G. Cunningham, vice-president of the company, for the purpose of protecting the plaintiff corporation, did advance the money for the plaintiff to bid in the said property at the sale, and did bid — the same in his own name for the use and benefit of the plaintiff company and received the sheriff's certificate of sale, receiving the same and holding the same in trust for the plaintiff corporation upon the repayment of the amount of

money so paid by him, all of which was well known to the defendant Kerns; that thereafter on the 18th day of August, 1904, the defendant Kerns, in violation of his said trust, and with intent to cheat and defraud the plaintiff, and in violation of the confidence reposed in him as attorney for the plaintiff, sold and conveyed to the defendant William J. Hall, an undivided one-fourth interest in said mining claims and received therefor the sum of $3,300, and that with the said money he redeemed said property from said sheriff's sale, and at the same time the said Kerns entered into an agreement with the defendant Hall, to sell and convey to him the remaining interest in said claims; that at the said time said Hall well knew the said property in equity belonged to the plaintiff, and well knew that the said defendant Kerns held the legal title in trust for the plaintiff and had no legal right to sell and convey
42 the same; that said Hall in making said purchase and contract was acting as the agent for the defendant, The Federal Mining & Smelting Company, and said Company furnished the money which was paid to said Kerns as aforesaid; that in making said sale to said Hall and entering into said contract with him the said Kerns violated the trust and confidence reposed in him as trustee of the plaintiff for the sole and simple purpose of defrauding the plaintiff and securing to himself an additional sum of money; that on the 29th day of May, 1905, the plaintiff corporation demanded of said Kerns the deed conveying all the Olympia, Portland, Seattle, Alice, Olympia Fraction, Darling, Pacific and Diamond Fraction and an undivided one-fourth interest in and to the Rose and Lincoln lode mining claims aforesaid, and tendered to said Kerns in lawful money of the United States, $900, and a certificate for one hundred thousand shares of the capital stock of the plaintiff corporation, which certificate of stock was paid up to the amount of ten cents per share for all that was due him under the original contract between said Cunningham and said Kerns, and for his services as attorney as aforesaid; and that the plaintiff has been at all times and is now ready and willing to make said payment, and now brings said money and stock into court to be delivered to him." Then follows prayer for the relief above indicated.

Many of the formal allegations of the complaint were ad-
43 mitted by the answer and denials of other allegations put in issue many of its material allegations, and for a separate and second defense the defendant Kerns sets up the transaction which occurred between him and Cunningham in detail, and set up the violation of said contract by Cunningham in that he failed to make the payments required by said contract and perform the work required to be performed by him upon said claim, and in the formation of the corporation under the laws of the State of Washington, instead of under the laws of the State of Idaho; that he was required to spend large sums of money in protecting his own interests in said mining claims during the years 1903, '04 and '05, because of the failure of the said Cunningham to keep his part of said agreement, that by reason of such negligence and laches by said

Cunningham and his breach of said agreement he impaired the title of the defendant Kerns by making the default in said payments and allowing the premises to be sold to a stranger.

The defendants, Hall and the Federal Mining & Smelting Company, answered denying many of the allegations of the complaint, and as an affirmative defense among other allegations alleged that they had advanced the defendant Kerns $3,300, which sum was devoted and used in redeeming said mining claims from said foreclosure sale and paying the necessary expenses for obtaining patents thereto; that thereafter said Kerns executed a deed to said
44 Hall but really for the use and benefit of said mining company, being an undivided one-fourth interest in and to said mining claims, and that said Hall held said one-fourth interest for the use and benefit of said mining company and now holds the same for that purpose; that at the time he executed said deed said Kerns entered into an agreement with said Hall for the purchase of the remaining three-fourths interest in said mining claims; that said contract of purchase was entered into for and on behalf of said mining company; that said contracts were made with said Kerns without any knowledge, information or beliefs of any right, title or claim on the part of the plaintiff corporation in and to said mining claims or any of them. It is further alleged that the money so advanced by Hall was used to perfect the title to said mining claims and that in case it is adiudged that the plaintiff is the owner of said premises that said defendants in equity ought to be reimbursed for said advances with interest theeron, and prays for relief in accordance with the denials and averments of their answer.

Upon the issues thus made the cause was tried to the court without a jury and a great deal of evidence was taken on the trial. Judgment was entered in favor of the plaintiff, from which judgment this appeal is taken. As this action is based upon the contract and declaration of trust hereinbefore set forth, we will first consider the duties assumed by Clarence Cunningham in the execution
45 of said contract. However, before taking that up in detail we will state some of the facts that appear from the record. On May 15, 1900, an option for the purchase of certain mining claims including at least a part of those mentioned in said contract, was given by the defendant Kerns and the said Elom, deceased, to Clarence Cunningham for $12,000. A considerable amount of work was done upon said claims under the option by Cunningham, and his associates. By mutual consent that option was terminated in October, 1900, a new contract was entered into. Under the new contract work continued during several months. Thereafter in February 1901 said Elom died, and after his death the contract sued on herein was entered into. It appears that this last contract was really a continuation of the two former ones excepting that it was on more liberal terms. At the time the first contract was entered into Cunningham had associated with him several persons residing in Spokane and elsewhere, who carried on the work and development of said mining claims as an association doing business under the name of the Olympia Mining Company. It appears that the work under

the first two contracts was practically continuous up until the time of entering into the contract sued on herein. The defendant Kerns was aware of the fact that Cunningham had associates connected with him in said matter, and we think, understood that these associates were assisting Cunningham in the payment of the development work done on said mines; that Cunningham and his asso-
46 ciates expended something over $21,000 in such development work, and it also appears that Kerns subscribed for ten thousand shares of the stock of said corporation at ten cents per share and paid the sum of $50.00 on such shares, leaving a balance of $950 owing to said corporation.

It is contended by the appellant that said contract is only an option to purchase and that because of the failure of Cunningham, or the respondent corporation, to pay the several sums of money at the time stipulated in said contract, the option to purchase was forfeited as time was of the essence of the contract. We will examine the contract to ascertain the duties and responsibilities assumed by Cunningham in executing it. After reciting the fact that the estate of Elom, deceased, was the owner of an undivided five-eighths interest in several of said mining claims and of an undivided one-half interest in the others, and that the said Kerns is the owner of the other portions of said claims, and that Kerns had petitioned the probate court for an order of sale of the interests belonging to said estate, and that said petition is to be heard on the third day of June, 1901, and it is anticipated that the order for the sale of said interests will be made, and that it is the desire of Kerns and Cunningham to purchase the interest of said estate in said claims if the same can be bought for a reasonable sum and upon reasonable terms, for the purpose of consolidating all of the interests therein and form-
47 ing a mining corporation to prospect, develop and work said mining claims, that Cunningham is about to leave the State of Idaho expecting to be gone two months or more, and that the sale of said premises may occur during his absence, and then occurs the following stipulation: "It is, therefore, mutually agreed that the party of the second part (Kerns) shall offer to purchase and purchase the interests of the estate of said decedent in said mining claims if the same can be purchased for the appraised value of said premises, or any less sum, and that the party of the first part (Cunningham) will assume and be responsible for the bid and purchase of the party of the second part, and furnish the necessary money to make such purchase at the time when called for by the party of the second part."

Under that stipulation if Kerns purchased the interest of the estate of said decedent in said mining claims for the appraised value, or less, which it is conceded he did, then Cunningham assumed and became responsible, to him for the amount bid for said interests, and obligated himself to furnish the money necessary to make the purchase at the time when called for by Kerns; that stipulation binds Cunningham and could have been enforced by Kerns against him after he had made the purchase of said interests under the terms of

said contract. There is nothing in that stipulation that leaves it optional with Cunningham whether he would pay Kerns the amount of the purchase or not. It was his bounden duty to pay
48 it when called for by Kerns. After that purchase was made by Kerns, and after performing the services to be rendered by him under said contract, he was entitled — and became the equitable owner of a one-tenth interest in all of said mining claims in which he at the time of executing the said contract had no interest. After Kerns had performed the services agreed to be performed, he could have maintained his action to recover title to a one-tenth interest in all of said mining claims in which he had no interest, and was entitled under the terms of said contract to a one-tenth interest of the capital stock of the contemplated corporation after the same was formed, which stock must be non-assessable until after the other nine-tenths of the stock had paid ten cents per share to said corporation for the development of said mining claims. And said Kerns after complying with his part of the contract, could have maintained an action to enforce that provision of the contract. It was not optional with Cunningham whether he complied with the obligations imposed on him by the contract. Those provisions and others of said contract are not in the nature of an option, are not unilateral but are such as might have been enforced by Kerns after he had performed his part of said contract. Cunningham agreed to do the following things: To pay the purchase price for the Elom interests or to furnish the neces-ary money to make that purchase; to form a corporation for the purpose of consolidating all of the
49 interests of said mining claims to prospect and develop them; to do the assessment work upon said claims for the year 1901; to cause to be transferred to Kerns ten per cent of the capital stock of said corporation fully paid up and non-assessable until after the other nine-tenths of said stock had paid ten cents per share for developing the properties; to pay Kerns the sum of $5,000 for his interest in said claims, and none of the stipulations in that agreement were optional with Cunningham but were absolute, and might be enforced by Kerns upon his compliance with the terms of said contract. Therefore, said contract was not an optional agreement *in* the part of Cunningham, but an absolute agreement which might have been enforced by suit after Kerns had performed the obligations imposed on him by the provisions.

It is contended that all of the allegations assumed by Cunningham under the provisions of said contract, have been fulfilled or that he has tendered performance. One of the obligations to be performed by him was the payment of the amount bid for the Elom interests in said mining claims. It appears that Kerns purchased said interest for $2,500, $500 in cash and $2,000 to be paid in one year to be secured by mortgage on that interest. The record shows that Cunningham paid the $500 and that Kerns executed the mortgage to secure the payment of the $2,000. The principal controversy arising out of this part of the contract was as to the payment of
50 the $2,000. Just before the maturity of the mortgage Cunningham had arranged to go to Alaska, and he testified on

the trial that he arranged with the mortgagee for an extension of the time of payment, or in event that could not be obtained that the money to pay the amount due on the mortgage would be paid by his associates. We find a very substantial conflict in the testimony on that point. Cunningham testified that before going north he arranged with his brother, Dr. Cunningham, vice-president of the respondent corporation, Francis Jenkins and F. C. Moore, two of his associates, that if the administratrix demanded the payment of the mortgage, that the two last named gentlemen would advance the necessary funds for that purpose. The testimony of Cunningham is corroborated by Jenkins and Moore, and is flatly contradicted by Kerns and the administratrix. It is not worth while for us to review the conflicting evidence upon this point as it appears that Cunningham, Jenkins and Moore, and also Dr. Cunningham, had conversations with Mr. Kerns with regard to the payment of this mortgage, and there is a conflict as to what was said. It is sufficient to say that upon this point *that* is a substantial conflict in the testimony. The money was not advanced to pay said mortgage, and a foreclosure suit was brought by the administratrix, decree of foreclosure obtained and the property advertised for sale to satisfy the judgment. Dr. Cunningham appeared at the sale accompanied by Kerns and
51 bid the property in, in his own name, but in fact for the benefit of the company, for the full amount of said mortgage, interest and costs. There is a great deal of conflict in the testimony with regard to this transaction. While Jenkins testifies that he was at all times ready, able and willing to furnish Kerns with the amount to satisfy said mortgage and accrued interest, the record does not show that he ever tendered it to him. The record shows that Kerns was very anxious to have this mortgage debt paid and no foreclosure proceedings brought against him as he thought that would be detrimental to his credit. But after the foreclosure sale occurred it seems that Kerns was entirely relieved of any liability by the purchase of said property at foreclosure sale by Dr. Cunningham, and Kerns was out no money in that regard. The court finds against Kerns, and under the well established rule, where there is a substantial conflict in the testimony, the findings of the court will not be disturbed on appeal.

It appears from the record that Cunningham did not furnish the money to pay off said mortgage when it became due or when demanded by Kerns, but at the foreclosure sale, Dr. Cunningham having bid in the property for the amount of the judgment and costs, that was a sufficient compliance with the terms of the contract upon that point, as Kerns was relieved thereby from further liability in said matter. If Kerns suffered any damages because of Cun-
52 ningham's laches or delay in paying the amount due on said mortgage, he has his remedy against Cunningham.

Cunningham further obligated himself by the provisions of said contract to organize a mining corporation for the purpose of consolidating all of the interests of said mining claims and to prospect, develop and work the same. The evidence shows that under the

first two contracts Cunningham had expended a large amount of money in working and developing said mining claims. Those operations were carried on in the name of the Olympia Mining Company; however, at that time, that was merely an association and not a corporation. It seems that the associates of Cunningham mostly resided outside of the State of Idaho. It appears that the plaintiff corporation was organized on the 30th day of March, 1903, under the laws of the State of Washington, and that it thereafter filed its Articles of Incorporation with the Secretary of State of the State of Idaho, and in all respects complied with the laws of that state so as to be entitled to do business and hold property therein. It is contended by counsel for appellant Kerns, that this was not a compliance with the provisions of said contract, as by the terms of said contract the corporation referred to was to have been organized under the laws of the State of Idaho; that as Cunningham and Kerns were both citizens of this state, it was presumed by Mr. Kerns that such corporation would be organized under the laws of this state.
53 The contract does not specify in what state such corporation must be organized and as the contract is silent upon that question, we think the organization of the corporation under the laws of the State of Washington and the compliance by such corporation with the laws of the State of Idaho, entitling it to do business and hold property in this state, was a sufficient compliance with the terms of said contract upon that point. It is a part of the history of corporations that they are very seldom organized in the state where they conduct their business; that being the history read and known by all men, if it was intended that such corporation must be organized under the laws of the State of Idaho, the contract should have so specified.

The next question is, did Cunningham do the assessment work on said claims for 1901? The record shows that he and his associates expended on said mining claims several thousand dollars during that year, and we think it is sufficiently shown that he did the assessment work for that year. While the evidence also shows that Kerns expended some money in doing assessment work on said claims in 1903, there seems to be a conflict as to whether that work was necessary or not.

The next question is whether the provisions of the contract requiring the delivery of ten per cent of the capital stock of the corporation has been performed or tendered. It appears from the record that the company was negligent in making that tender as
54 the corporation was organized in March 1903, and the tender was not made until the 29th day of May, 1905, more than two years after the organization of said corporation; but it seems that during those two years the representatives of the corporation and Mr. Kerns were endeavoring to compromise and settle the matter, get it adjusted, in some way by this delay.

It was further stipulated in said contract that Cunningham should pay Kerns for all of his right, title and interest in and to said mining claims, the sum of $5,000, which amount was to be paid on the com-

pletion of the purchase of the interests of the estate of Elom in and to said mining claims. That purchase occurred on July 20th, 1901, and under the terms of said contract, said $5,000 became due and payable on that date; but it appears from the record that on August 15th, 1901, $1,200 of the $5,000 was paid, and other payments were made along at different dates as late as July, 1902, making a total sum paid of $4,100 leaving a balance due of $900. It would appear from this that Kerns did not insist upon the payment of said $5,000 at the time of the purchase of the Elom interests and that he accepted payments from time to time long after said interests had been purchased. That being true, it would indicate at least that he had waived the payment according to the letter of the contract, and as time was not of the essence of said contract, we think the
55 tender of the balance due on said purchase price was a sufficient compliance with it. When we take into consideration that Kerns had purchased ten thousand shares of the stock of said corporation and had paid $50 thereon and was still owing the corporation $950 on said stock, and the further consideration that there were efforts made during the two years to settle, adjust and compromise those matters, we conclude that upon the payment to Kerns of the $900 with interest from the date it became due, he must comply with his part of the contract.

It is apparent that the object, aim and purpose of that contract was to consolidate all of the outstanding titles and interests in said mining claims and to organize a corporation for the purpose of taking over, working and developing the same. If that provision of the contract stood as a contract by itself whereby Kerns agreed to convey to the party of the first part all of his right, title and interest in and to said mining claims, it might and probably would be held that time was of the essence of it, but where the contract contains several different clauses in regard to different interests in mining claims, the contract must be construed as a whole, and construing this contract in that way it cannot be held that time was of its essence.

This conclusion seems irresistable when we take into consideration the declaration of trust executed by Kerns on the 17th day of August, 1901, for prior to that date he had purchased the Elom estate
56 interests in and to said mining claims, and the $5,000 which Cunningham agreed to pay him for his interests became due under the terms of the contract prior to the execution of said declaration of trust, and it seems clear from the provisions of said contract and said declaration of trust that it was not intended that Cunningham should forfeit his interest in said mining claims because of his failure to make any of the payments at the time they became due under said contract.

As we understand the record at the present time the matter is substantially as follows: At the time said contract was entered into, Kerns owned an undivided three-eighths interest in the Olympia, Seattle, Portland, Olympia Fraction and Alice mining claims, and an undivided one-half interest in the Darling, Pacific, Rose, Lincoln and Diamond Fraction mining claims, and as a result of said con-

tract according to his interpretation of it, he still has the same interest standing in his name and an additional three-eighths of the first five named claims and one-fourth more of the last named three claims, and $4,100 in cash, and a part of said mining claims patented. In other words, without expense to himself he has received $4,100 and an additional three-eighths interest in five of the said mining claims, and a one-fourth interest in three, and certain of them patented, and all really at the expense of the plaintiff
57 or its predecessor in interest. Of course, that would make no difference if time was of the essence of the contract, and that provision had in no manner been waived; but as above stated, time was not of the essence of this contract, and because of the substantial conflict in the evidence we conclude that the judgment of the trial court must be affirmed and it is so ordered. Costs are awarded to the respondent.

Stockslager, C. J., and Ailshie, J., concur.

Exhibit "C."

Olympia Mining Company, Respondent,
vs.
A. G. Kerns et al., Appellants.

(91 Pac., 92.)

Appeal from the District Court of the First Judicial District of the State of Idaho for Shoshone County.

Ralph T. Morgan, Judge.

An action to enforce specific performance of a contract. Judgment for the plaintiff. Reversed.

On Rehearing.

This case was presented at the October 1906 term, and decided in favor of the plaintiff. A rehearing was granted and the
58 former decision reversed, as appears from the following opinion:

Sullivan, *J.*:

This action was commenced by the Olympia Mining Company, a corporation, as plaintiff, against Abner G. Kerns, William J. Hall and the Federal Mining & Smelting Company, a corporation, as defendants, for the purpose of having the plaintiff corporation declared the equitable owner of an undivided three-fourths interest in the Olympia, Portland, Seattle, Alice, Olympia Fraction, Pacific, Darling, Diamond Fraction, and an undivided one-fourth interest in the Rose and Lincoln lode mining claims, all situated along Nine

Mile Creek, in Placer Center and Leland Mining Districts, Shoshone County, and to compel the appellant Kerns to convey to the plaintiff corporation, by good and sufficient deed, an undivided three-fourths interest in and to said mining claims upon the payment to him of $900 with interest, and upon delivery to him of one hundred thousand shares of the capital stock of the plaintiff corporation, paid up to the amount of ten cents per share, and to compel the defendant, the Federal Mining & Smelting Company, to convey to the plaintiff an undivided one-fourth interest to each of said mining claims upon the payment to it of $3,300 with interest thereon.

This action is based upon the following contract or agreement, to-wit:

"This agreement made and entered into on this 28th day
59 of May, 1901, by and between Clarence Cunningham, party of the first part, and A. G. Kerns, party of the second part, all of the City of Wallace, County of Shoshone, State of Idaho, witnesseth:

"Whereas the estate of Edward T. Elom, deceased, is the owner of an undivided five-eighths of the Olympia, Seattle, Portland, Olympia Fraction, and Alice; and an undivided one-half of the Darling, Pacific, Rose, Lincoln and Diamond Fraction lode mining claims, situated in the Placer Center and Leland Mining District, in the county of Shoshone, State of Idaho, lying between the Mammoth and Sixteen to One mines, and south of the Custer Mine; and the party of the second part is the owner of the other portion of the said mining claims except the Rose and Lincoln; and

"Whereas, the party of the second part as such co-owner has petitioned the probate court for an order of sale of the interest of the estate of said deceased in said mining claims and said petition is to be heard on the 3rd day of June, 1901, and it is anticipated that an order for the sale of said property will be made; and

"Whereas, it is the desire of the parties hereto to purchase the interests of said estate in said properties if the same can be bought for a reasonable sum and upon reasonable terms, for the purpose of consolidating all of the interests therein and forming a
60 mining corporation to prospect, develop and work*ing* said mining claims; and

"Whereas, the party of the first part is about to leave the State of Idaho, expecting to be absent for a period of two months more or less, and the sale of said premises may occur during said period.

"It is therefore mutually agreed that the party of the second part shall offer to purchase and purchase the interest of the estate of said decedent in said mining claims, if the same can be purchased for the appraised value of said premises or any less sum; and the party of the first part will assume and be responsible for the bid and purchase of the party of the second part, and furnish the necessary money to make such purchase at the time when called for by the party of the second part.

"And in consideration of the premises and the services to be so rendered by the party of the second part, it is further mutually agreed that said party of the second part shall be entitled to one-

tenth of all of said mining claims, in which he at present has no ownership.

"And it is further agreed that upon the formation of the corporation hereinbefore referred to, which corporation is to be formed as soon as practicable after making said purchase, the party of the second part shall have and be entitled to one-tenth of the stock of said corporation; which stock shall be fully paid up, and
61 non-assessable until after all of the other nine-tenths of the stock have paid ten cents per share to said corporation for the development of said mining claims.

"And as a further consideration the party of the first part hereby agrees to do and perform on each of said mining claims the assessment work required for the year 1901, free of expense to the party of the second part.

"And as a further stipulation the party of the second part agrees to convey to the party of the first part or his assigns, all his right, title and interest in said mining claims for the sum of five thousand dollars to be paid upon completion of the purchase of the interest of said estate in the premises or sooner.

"Witness our hands and seals this 28th day of May, 1901.

CLARENCE CUNNINGHAM.
A. G. KERNS."

It is alleged in the complaint that pursuant to said agreement the defendant Kerns did prosecute a proceeding in the Probate Court asking for a sale of the interest of Edward T. Elom, deceased, in and to said mining claims, and procured an order from said court on the third day of June, 1901, directing the sale thereof; that thereafter, on the twentieth day of July, said Kerns did purchase at public sale the said interest for the sum of $2,500, of which $500 was paid in cash and the remaining portion, $2,000, was se-
62 cured by mortgage upon said mining interests due and payable within one year from the date thereof, and that said sale was confirmed thereafter by said court; that thereafter, pursuant to said agreement, Clarence Cunningham, the first party to said agreement, representing himself and his associates, did expend approximately the sum of $25,000 in developing and working the said claims, and they did pay the said Kerns $4,100 on account of the payment of the $5,000 due said Kerns under said agreement, together with one-tenth of all of said mining claims upon the formation of the corporation referred to in said contract, which interest was represented by one hundred thousand shares of the capital stock of plaintiff, which stock was to be fully paid up and non-assessable until after the other nine-tenths of the stock had paid ten cents per share to said corporation for the development of said mining claims, which was the consideration paid for the interests held by Kerns in said mining claims and for services to be rendered by him in securing patents therefor; that the sum of $500, the first payment on the purchase price of said Elom's interest, was paid to said Kerns by the said Cunningham and his associates; that after the confirmation of said sale the administratrix of the estate of the said Elom,

deceased, executed and delivered a deed to said mining interests belonging to the estate of the said Elom, to said Kerns, grantee, and that said Kerns made and executed to said administratrix of
63 said estate a mortgage upon said mining interests to secure the payment of the balance due therefor; that said Kerns took the title to said mining interests in trust for the corporation provided to be formed under the terms of said agreement; that it was understood and agreed between said Kerns and the said Cunningham and his associates that their successor in interest, the corporation to be formed, would furnish the additional money necessary to pay for the said interests, and to pay the said mortgage when it became necessary to pay the same in order to protect said trust estate; that after the purchase of said Elom's interest as aforesaid, and after receiving deed therefor, said Kerns did make, execute and deliver a declaration of trust as follows:

"I, A. G. Kerns, of the City of Wallace, County of Shoshone, State of Idaho, do hereby declare and acknowledge that I hold the legal title to the following interests in certain mining claims in trust for the use and benefit of a corporation to be hereinafter formed, and to be named the Olympia Mining Company, provided Clarence Cunningham of the City of Wallace, in the County of Shoshone, State of Idaho, or the said corporation, shall comply with the provisions of an agreement in writing dated the 28th day of May, 1901, between the said Clarence Cunningham and the said A. G. Kerns.

"The said mining premises being particularly described as follows, to-wit:

64 The "Olympia" lode mining claim.
The "Portland" lode mining claim.
The "Seattle" lode mining claim.
The "Alice" lode mining claim.
The "Olympia Fraction" lode mining claim.
The "Darling" lode mining claim.
The "Pacific" lode mining claim.
The "Diamond Fraction" lode mining claim.
One half of the "Rose" lode mining claim.
One half of the "Lincoln" lode mining claim.

All situated on the divide between Canyon Creek and the East Fork of Nine Mile Creek, in Placer Center and Leland Mining District, County of Shoshone, State of Idaho.

"Dated this 17th day of August, 1901.

Witness my hand and seal.

[SEAL.] A. G. KERNS."

That thereafter said Kerns in his own name and in fact as trustee for the said contemplated corporation, applied for United States patents for part of said mining claims, that in applying for said patents the said Kerns acted only as trustee for said corporation to be formed under the terms of said agreement and declaration of trust; that he was also acting as agent and attorney for said corporation and the parties organizing the same, and that said

parties furnished and paid all the necessary expenses of said
65 application for patent; that said Cunningham and his associates, by and with the full consent of said Kerns, and under the terms of said agreement and declaration of trust, continued to expend money in the development of said mining claims up to and until about the first day of March, 1903, pursuant to said agreement, and the said Cunningham and his associates, acting in pursuance of said agreement and declaration of trust, caused to be organized the plaintiff corporation under the laws of the state of Washington, with a capital of $1,000,000, divided into one million shares of the par value of $1.00 each; that said Kerns was notified of said organization and acquiesced in and concurred therein, and agreed to the same and made no objection thereto; that thereafter said corporation duly complied with all the laws of the state of Idaho authorizing it to hold mining claims and to prosecute business in said state; and that it is now authorized to take and hold and convey real estate, and to do business in said state; that in the year 1903, after the organization of the plaintiff company, on account of large expenditures made by the incorporators in the development of said mining claims and in the payments made to said Kerns by the plaintiff corporation, there was not sufficient money in the treasury of said company to pay said mortgage, and that said Cunningham, who had the management of the affairs of the company, was about to leave for a trip to Alaska, entered into an arrangement
66 for and on behalf of the plaintiff corporation with J. G. Cunningham, vice-president of the company, and F. Cushing Moore and Francis Jenkins, stockholders of the company, that in case payment of said mortgage should be insisted upon they would advance the money for the company, to pay the same, and notified said Kerns of such arrangement, and directed him that in case payment should be insisted upon, he should call upon said parties for the money to pay said mortgage, and that Kerns promised to do so; that on or about the first day of June, 1903, the administratrix of the estate of the said Elom, deceased, did commence an action to foreclose said mortgage; that said Kerns did not notify the plaintiff corporation nor said Cunningham, nor any of the officers or stockholders of the said company, but permitted a decree and judgment of foreclosure to be entered directing the sale of said mining claims to pay said mortgage; that the date of said sale was fixed, and the said J. G. Cunningham, vice-president of the company, for the purpose of protecting the plaintiff corporation, did advance the money for the plaintiff to bid in the said property at the sale, and did bid the same in, in his own name, for the use and benefit of the plaintiff company, and received the sheriff's certificate of sale, receiving the same and holding the same in trust for the plaintiff corporation upon the repayment of the amount of money so paid by him, all of which was well known to the defendant Kerns; that thereafter, on the eighteenth day of August,
67 1904, the defendant Kerns, in violation of his said trust, and with intent to cheat and defraud the plaintiff, and in violation of the confidence reposed in him as attorney for the plaintiff,

sold and conveyed to the defendant, William J. Hall, an undivided one-fourth interest in said mining claims, and received therefor the sum of $3,300, and that with the said money he redeemed said property from said sheriff's sale, and at the same time the said Kerns entered into an agreement with the defendant Hall to sell and convey to him the remaining interest in said claims; that at the said time said Hall well knew the said property in equity belonged to the plaintiff, and well knew that the said defendant Kerns held the legal title in trust for the plaintiff, and had no legal right to sell and convey the same, that said Hall in making said purchase and contract, was acting as the agent for the defendant, the Federal Mining & Smelting Company, and said company furnished the money which was paid to said Kerns as aforesaid; that in making said sale to said Hall and entering into said contract with him the said Kerns violated the trust and confidence reposed in him as trustee of the plaintiff for the sole and simple purpose of defrauding the plaintiff and securing to himself an additional sum of money; that on the twenty-ninth day of May, 1905, the plaintiff corporation demanded of said Kerns the deed conveying all the

68 Olympia, Portland, Seattle, Alice, Olympia Fraction, Darling, Pacific and Diamond Fraction and an undivided one-fourth interest in and to the Rose and Lincoln lode mining claims, aforesaid, and tendered to said Kerns, in lawful money of the United States, $900, and a certificate for one thousand shares of the capital stock of the plaintiff corporation, which certificate of stock was paid up to the amount of ten cents per share for all that was due him under the original contract between said Cunningham and said Kerns, and for his services as attorney as aforesaid; and that the plaintiff has been at all times, and is now, ready and willing to make said payment, and now brings said money and stock into court to be delivered to him." Then follows prayer for the relief above indicated.

Many of the formal allegations of the complaint were admitted by the answer, and denials of other allegations put in issue many of its material allegations, and for a separate and second defense the defendant Kerns sets up the transaction which occurred between him and Cunningham in detail, and sets up the violation of said contract by Cunningham, in that he failed to make the payment required by said contract, and perform the work required to be performed by him upon said claims, and in the formation of the corporation under the laws of the State of Washington instead of under the laws of the state of *Washington instead of under the laws of the* Idaho; that he was required to spend large sums of money in pro-

69 tecting his own interests in said mining claims during the years 1903, 1904 and 1905, because of the failure of the said Cunningham to keep his part of said agreement; that by reason of such negligence and laches by said Cunningham and his breach of said agreement he impaired the title of the defendant Kerns, by making the default in said payments and allowing the premises to be sold to a stranger.

The defendant Hall and the Federal Smelting & Mining Com-

pany answered, denying many of the allegations of the complaint; and as an affirmative defense, among other allegations, alleged that they had advanced the defendant Kerns $3,300 which sum was devoted and used in redeeming said mining property from said foreclosure sale, and paying the necessary expenses for obtaining patents thereto; that thereafter said Kerns executed a deed to said Hall, but really for the use and benefit of said mining company, being an undivided one-fourth interest in and to said mining claims, and that said Hall held said one-fourth interest for the use and benefit of said mining company, and now holds the same for that purpose; that at the time he executed said deed said Kerns entered into an agreement with said Hall for the purchase of the remaining three-fourths interest in said mining claims; that said contract of purchase was entered into for and on behalf of said mining company; that said contracts were made with said Kerns without any knowledge, information or belief of any right,
70 title or claim on the part of the plaintiff corporation in and to said mining claims, or any of them. It is further alleged that the money so advanced by Hall was used to perfect the title to said mining claims, and that in case it is adjudged that the plaintiff is the owner of said premises, that said defendants in equity ought to be reimbursed for said advances with interest thereon, and prays for relief in accordance with the denials and averments of their answer.

Upon the issues thus made the cause was tried to the court without a jury, and a great deal of evidence was taken on the trial. Judgment was entered in favor of the plaintiff, from which judgment this appeal was taken. As this action is based upon the contract and declaration of trust hereinbefore set forth, we will first consider the duties assumed by Clarence Cunningham in the execution of said contract. However, before taking that up in detail, we will state some of the facts that appear from the record. On May 15, 1900, an option for the purchase of certain mining claims, including at least a part of those mentioned in said contract, was given by the defendant Kerns and the said Elom, now deceased, to Clarence Cunningham for $12,000. A considerable amount of work was done upon said claims under this option by Cunningham and his associates. By mutual consent that option was terminated, and in October, 1900, a new contract was entered into. Under the new contract work continued during several months. Thereafter, in February, 1901, said Elom died, and after his death the
71 contract sued on herein was entered into. It appears that this last contract was really a continuation of the two former ones, excepting that it was on more liberal terms. At the time the first contract was entered into Cunningham had associated with him several persons residing in Spokane and elsewhere, who carried on the work and development of said mining claims as an association doing business under the name of the Olympia Mining Company. It appears that the work under the first two contracts was practically continuous up until the time of entering into the contract sued on herein. The defendant Kerns was aware of the fact that Cunning-

ham had associates connected with him in said matter, and, we think, understood that these associates were assisting Cunningham in the payment of the development work done on said mines; that Cunningham and his associates expended something over $21,000 in such development work, and it also appears that Kerns subscribed for ten thousand shares of the stock of said corporation to be thereafter formed, at ten cents per share, and paid the sum of $50 on such shares, leaving a balance of $950 owing to said corporation.

It is contended, in limine, by counsel for respondent that, as some of the questions raised on the rehearing were not raised on the original hearing, they cannot now be considered. In reply to this we say that the rehearing was granted generally, and upon
72 no specified points or questions, and therefore any questions that could have been properly raised on the original hearing could be presented on the rehearing. But, as we understand the record, the appellant Kerns did raise the questions referred to on the first hearing. As we view this case, we need only pass upon, in this decision, a few of the errors assigned.

Counsel for appellant first contend that the judgment and decree of the lower court does not provide a specified time in which respondent shall pay to appellant the sum of $900, the balance due on the purchase price, and turn over to him one hundred thousand shares of stock, and that it does not provide that respondent shall proceed to work, prospect and develop their property in dispute until the proceeds of the nine hundred thousand shares of stock at ten cents per share shall have been expended. On an examination of the judgment we find that it provides in part as follows:

"It is further ordered, adjudged and decreed that the defendant Abner G. Kerns, upon delivery to him by the plaintiff of the $900 due under the contract herein, with legal interest, from the time said — became due until May —, 1905, and upon the delivery to said Kerns of one hundred thousand (100,000) shares of the capital stock of said plaintiff corporation paid up to the amount of 10 cents per share, do forthwith execute and deliver to the plaintiff Olympia Mining Company, a good and sufficient deed conveying to
73 said plaintiff an undivided three-fourths interest in and to the said above-described mining claims; that in the event of his failure to execute and deliver such conveyance within thirty days after the entry of this decree, then and in that event Stanley P. Fairweather, Esqr., clerk of this court, and in case of his death or inability to act, then his successor in office, is hereby appointed as a commissioner of this court, and as such commissioners is hereby ordered and directed in the name of the defendant to execute and deliver to the plaintiff a deed conveying to it the said three-fourths interest in said mining claims above described; and it is further ordered and adjudged that said deed of said commissioner, when executed and delivered, shall have the same force and effect as though executed by the defendant."

It will be observed that that provision of the judgment or decree is not in accordance with the terms of the contract sued on, which contract is above set out in full in this opinion. Under that pro-

vision of the decree, it is provided that Kerns, upon the payment to him, by plaintiff, of $900, and the delivery to him of one hundred thousand shares of the capital stock of said corporation "paid up to the amount of ten cents per share," should forthwith execute and deliver to the plaintiff a good and sufficient deed to an undivided three-fourths interest in the mining claims mentioned, and that in
74 the event of his failure to do so within thirty days after the entry of the decree, then in that event the clerk of the court should make such conveyance. Of course, the decree provides that Kerns shall make such deed upon the payment of said sum of money, and the delivery of said shares of stock, but it provides that in case he fails to execute and deliver such deed within thirty days after the entry of this decree, the clerk shall execute the deed, regardless of whether said $900 had been paid and said one hundred thousand shares of stock delivered. For that reason said provisions of the judgment are not in accord with the covenants of said contract. Said judgment provides that the respondent shall deliver to Kerns one hundred thousand shares of the capital stock of said corporation "paid up to the amount of ten cents per share," while the contract provides that said corporation shall deliver to Kerns one-tenth of its capital stock, which, on the basis of a million shares, would be one hundred thousand shares, and provides as follows: "Which stock shall be fully paid up and non-assessable until after all of the other nine-tenths of the stock have paid ten cents per share to said corporation for the development of said mining claims." It will be observed from this provision of the contract that the one hundred thousand shares of stock to be delivered to Kerns was to be fully paid up—not as provided in said decree, "paid up to the amount of ten cents
per share," but fully paid up and non-assessable until all of
75 the other nine-tenths of the stock have paid ten cents per share to said corporation for the development of said mining claims. Under the decree, the one hundred thousand shares of stock to be delivered to Kerns was to be paid up to the amount of ten cents per share, when under the contract it was to be fully paid up and non-assessable until all of the other nine-tenths of the stock had paid ten cents per share in assessments toward the development of said mining claims. If Kerns' stock was to be paid up to the amount of ten cents on the share only, the par value being one dollar, it would leave his stock at the mercy of the "mutatious whims" of the other stockholders in creating indebtedness in the operation and development of said mines, and if they failed to pay any and all indebtedness incurred in the development of said mines up to $90,000, the creditors could recover of Kerns to the extent of ninety cents per share on his stock, as the stock mentioned in said decree is only paid up to the extent of ten cents per share.

We held in the former opinion that under the provisions of said contract, Cunningham had obligated himself to organize the corporation referred to in said contract, and that the organization of the respondent corporation was a sufficient compliance with said provisions. The provision of said contract in that regard is as follows:

"Whereas, it is the desire of the parties hereto to purchase the interest of said estate in said properties, if the same can be bought for
76 a reasonable sum and upon reasonable terms, for the purpose of consolidating all of the interests therein and forming a mining corporation to prospect, develop and work said mining claims."

Under the provisions of said clause of the contract, it was the desire of the "parties" thereto to form a corporation, and the clear inference therefrom is that the "parties" were to form a corporation and the "parties" were Kerns and Cunningham. Now, it appears from the record that Kerns was not consulted in any manner in the formation of the foreign corporation, the Olympia Mining Company; that said corporation was organized under the laws of the State of Washington, and it is earnestly contended by counsel for respondent Kerns, that the organization of such corporation is not in compliance with said terms of the contract. It appears from the record that Kerns insisted that the corporation should be organized under the laws of the State of Idaho, and thereby become subject to the jurisdiction of the courts of this State the same as a private individual. Under the provisions of the contract, Kerns had a right to insist on the organization of such corporation under the laws of the State of Idaho. That being the conclusion we have reached after a careful consideration of his case, on the petition and arguments of the rehearing, the decision of that question ends this case, for until a corporation is organized in compliance with the provisions of said contract, neither Cunningham nor the re-
77 spondent corporation can enforce the provisions of said contract against Kerns. Until a corporation has been organized under the provisions of the contract and has fully complied with the terms and provisions of said contract, the contract cannot be enforced against Kerns. As that is a controlling question in this case, it is not worth while for us to consider the other questions raised.

Under the provisions of this agreement Kerns was entitled to the same voice as Cunningham in the organization of the corporation. It is true that it would take more than two persons to organize a corporation under the laws of this state, or, for that matter, under the laws of Washington; still, had the corporation been organized in compliance with the provisions of this agreement, Kerns would have been entitled to a voice in the selection of the other directors and incorporators, and he would also have been entitled to a voice in determining where the corporation should be organized, whether it should be a domestic or a foreign corporation. Again, after the organization of the corporation, under the cumulative method of voting stock at stockholders' meetings (Const. art. 11, sec. 4), Kerns might have been able to name at least one director, and would by this method have been enabled to have a continuing voice in the business and affairs of the corporation. While it is true that the contract does not provide in terms that the corporation to be organized should be a domestic corporation, at the same time
78 the appellant had reserved to himself by the terms of the contract as much power and authority and an equal vote

with the other party to the contract. The corporation could not own any property, and had no corporate stock to be represented by stockholders until after it was organized, therefore Kerns would have had as much power and authority in the matter of the organization as Cunningham, even though Cunningham and his associates were to own nine-tenths of the capital stock after the organization. The contract is not one providing for Cunningham and his associates to organize a corporation, but for Cunningham and Kerns to organize a corporation. A corporation organized under the laws of Washington with its principal place of business in Spokane, and its corporate stock books in a foreign jurisdiction, is not the kind of a corporation and the kind of protection that Kerns would likely have sought or availed himself of where he was turning over all of his property to the corporation and in turn making a minority of the stock. The courts of Idaho could not reach the books and officers for the purpose of ordering a specific performance in directing the issuance of stock or requiring performance of work or directing, supervising or ordering assessments.

It is next urged that the judgment does not bind or obli*agte* the plaintiff to the defendant Kerns or to any of the defendants to perform its contract with Kerns or to pay the $3,300 and interest to the Federal Mining Company, and that the evidence shows
79 that the defendant Kerns could not maintain an action in Idaho against the plaintiff for the specific performance of the contract. Counsel for respondent declares this proposition to be absurd, for the reason that respondent has an agent in Idaho authorized to accept service of process, and has mining property in this state in which it has vested over $21,000, and that ought to be ample to make such judgment collectible. Counsel thus concedes that for a complete settlement of this matter, it will require further litigation, and that this judgment does not settle all of the rights of the parties in the subject matter of this litigation. It is certainly cold satisfaction to the appellant to be informed that he may proceed and get judgment for the amount of money due him and a decree for the delivery of the one hundred thousand shares of stock. It is clearly evident that the judgment is far short of what it ought to have been. The respondent should have been compelled to keep its tender of the $900 and one hundred thousand shares of stock good. The contract clearly contemplates the performance of development work on said mining claims to the extent of $90,000, and it is admitted by counsel for respondent in his brief filed the second day of April, 1907, that neither that amount nor any part of it has been expended in the development of said mines, by stating that said corporation had invested over $21,000 in said mining claims, which amount, the record shows, was invested long
80 prior to the commencement of this suit. Under this judgment, the respondent, a foreign corporation, is not required to pay to the appellant Kerns at any certain time the $900 with interest thereon; it is not required to deliver to said Kerns one-tenth of its capital stock, which stock should be fully paid up and nonassessable, until after all of the other nine-tenths of the stock has

paid ten cents per share to said corporation for the development of said mining claims. The provisions of the contract on which this action is based require these things to be done, and the judgment utterly fails to give Kerns the relief he is entitled to in this suit, if he is compelled to perform his part thereof.

The judgment entered in this case does not conform to the provisions and requirements of the contract entered into between the appellant and Cunningham and we have concluded that it should be reversed and a new trial granted. We are not in a position to direct a judgment in this case. It has now been more than a year since the case was tried in the lower court, and while it has been suggested, and even shown by affidavit, that no attempt has been made on the part of the respondent, to comply with the terms of the decree, still the matter is not presented there in such a manner as to justify us in ordering a judgment thereon. The conduct of the respective parties since the entry of this decree with reference thereto, and also touching the subject matter, and under
81 the contract which were the basis of this action, will be proper subject for consideration, and they will necessarily influence the trial court in the further proceedings had herein. The judgment is therefore reversed, and the cause remanded, with direction to the trial court to take such further action in the matter in harmony with the views herein expressed as to the law of the case as may seem proper under any additional showing that may be made.

Costs awarded in favor of appellant.

Ailshie, C. J. concurs.

Filed March 28, 1912.

STATE OF IDAHO,
County of Shoshone, ss:

The Demurrer of the defendant *having been* sustained *the* default of plaintiff *for* not electing to stand on its complaint or amending its complaint within the time allowed by order of the Court herein entered this 8th day of June A. D. 1912.

JOHN P. SHEEHY,
Clerk District Court,
By L. R. ADAMS, *Deputy.*

(Title of Court and Cause.)

Demurrer.

82 Now comes the defendant Abner G. Kerns and demurs to the complaint herein and for cause of demurrer, alleges:

1.

That this Court has no jurisdiction of the subject matter of this action.

2.

That the complaint does not state facts sufficient to constitute a cause of action.

3.

That the complaint is uncertain in not showing that Clarence Cunningham kept or performed his part of the agreement of May 28th, 1901, and in not showing any valid excuse for his failure to keep his part of the said contract.

4.

That the cause of action is barred by the provisions of section 4036 of the Revised Codes of Idaho.

5.

That the cause of action is barred by the provisions of section 4052 of the Revised Codes of Idaho.

6.

That the cause of action is barred by the provisions of section 4054 of the Revised Codes of Idaho.

7.

That the cause of action is barred by the provisions of section 4060 of the Revised Codes of Idaho.

83 Wherefore, Defendant prays judgment of his demurrer.

FRANKLIN PFIRMAN,
Attorney for Defendant, Wallace, Idaho.

Service of the within Demurrer is hereby accepted this 30th day of March 1912.

A. E. MAYHEW,
One of the Attorneys for Plaintiff.

Filed March 30, 1912.

(Title of Court and Cause.)

Ruling on Demurrer.

The demurrer of the defendant to the complaint herein having heretofore come on regularly for hearing before the undersigned judge of the above-named court, the defendant appearing by his attorney Mr. Franklin Pfirman, and the plaintiff appearing by its attorney Mr. E. C. Macdonald, and the court having heard the argument of the respective attorneys and considered the briefs submitted by each and being now fully advised in the premises:

It is ordered that said demurrer be and the same is hereby sustained.

It is further ordered that plaintiff shall have fifteen days to elect whether to stand on its complaint or amend its complaint.

84 Dated this 27th day of April 1912.

WILLIAM W. WOODS, *Judge.*

Filed April 27, 1912.

(Title of Court and Cause.)

Order Dismissing Action.

The demurrer of the defendant to the complaint herein having heretofore come on regularly for hearing before the undersigned judge of the above named court, the defendant appearing by his attorney, Mr. Franklin Pfirman, and the plaintiff appearing by its attorney, Mr. E. C. McDonald, and the court having heard the arguments of the respective attorneys, and having considered the brief submitted by each, and thereafter and on the 27th. day of April, 1912, the court by its order — sustained said demurrer and granted the plaintiff 15 days' time to elect whether to stand on its complaint, or amend its complaint, and thereafter the court by its order having granted the defendant — days' additional time to elect whether to stand on its complaint or amend its complaint, and said time having expired, and the plaintiff *has* neither elected to stand on its complaint, or amend the same, and its default having been duly and regularly entered herein:

It is therefore hereby ordered, adjudged and decreed that this action be and the same is hereby dismissed, and that the de-

85 fendant have and recover of and from plaintiff his costs and disbursements herein taxed at the sum of ($3.00) Three & No/100 dollars.

Dated and rendered this 8th day of June, 1912.

WILLIAM W. WOODS, *Judge.*

Filed June 8, 1912.

(Title of Court and Cause.)

Judgment Roll Certificate.

I, the undersigned, Clerk of the District Court of the First Judicial District of said State, in and for said County, do hereby certify the foregoing to be a true copy of the Judgment entered in the above entitled action, and recorded in Judgement Book "E" of said Court on Page 75. And I further certify that the foregoing papers, hereto annexed, constitute the Judgment Roll in said action.

Witness my hand and the seal of the said District Court this 8th day of June 1912.

[SEAL.]

JOHN P. SHEEHY, *Clerk.*

By R. L. ADAMS,

Deputy Clerk.

Filed June 8, 1912.

86 (Title of Court and Cause.)

Notice of Appeal.

To the above-named defendant and to Franklin Pfirman, his attorney:

Please take notice that the above named — hereby appeals to the Supreme Court of the State of Idaho from that certain order made and entered in this action by the above named District Court on the eighth day of June, 1912, and filed in the office of the clerk of said court on the eighth day of June, 1912, dismissing the above entitled action, and from each and every part and the whole thereof of said order.

Dated this 24 day of July, A. D. 1912.

JOHN P. GRAY,
Attorney for Plaintiff;
Residence, Cœur d'Alene, Idaho.
E. C. MACDONALD,
Attorney for Plaintiff;
Residence, Spokane, Washington.

Filed July 25, 1912.

(Title of Court and Cause.)

Undertaking on Appeal.

87 Whereas the plaintiff above named has served on the defendant herein and filed with the clerk of the above entitled court notice of appeal from the order of said District Court made, entered and filed in said court on the eighth day of June, 1912, dismissing the above entitled cause, and said plaintiff has thereby taken an appeal from said order and from the whole thereof to the Supreme Court of Idaho;

Now therefore the National Surety Company of New York, a corporation duly organized to execute in the State of Idaho undertakings on appeal to the Supreme Court of Idaho, as surety for the above named plaintiff does hereby undertake and promise on the part of the said plaintiff and appellant that the said plaintiff and appellant will pay to the said Abner Kerns, defendant and respondent herein, his heirs, executors, administrators or assigns, all damages and costs which may be awarded against the said plaintiff and appellant Olympia Mining & Milling Company on the said appeal herein, to-wit, the appeal from the order and judgment of said district court made, filed and entered in said court on the 8th day of June, 1912, dismissing the above entitled cause, or a dismissal or withdrawal thereof not exceeding the amount of $300.00 to which amount the undersigned, National Surety Company of New York, surety, does hereby acknowledge itself firmly bound by these presents."

Witness the signature and seal of said National Surety
88 Company by A. L. Nicholson, its Agent, and A. H. Featherstone, its attorney in fact, hereunto duly authorized.

NATIONAL SURETY COMPANY,
By A. L. NICHOLSON, AND
By A. H. FEATHERSTONE,
Its Attorney in Fact.

STATE OF IDAHO,
County of Shoshone, ss:

A. L. Nicholson, and A. H. Featherstone, being first duly sworn, says: that National Surety Company, the surety in the foregoing undertaking on appeal, is authorized under the laws of the State of Idaho to become surety upon undertakings of such nature; that these affiants are the duly appointed, qualified and acting and authorized attorneys in fact to execute such undertaking, and that the foregoing undertaking is executed with full and complete power and authority on the part of said surety and its said attorneys in fact.

A. L. NICHOLSON.
A. H. FEATHERSTONE.

Duly verified.

Filed July 26, 1912.

(Title of Court and Cause.)

Præcipe.

89 To John P. Sheehy, Clerk:

You are hereby requested to prepare transcript on appeal in the above entitled action, consisting of the following papers:

Judgment Roll, comprising Complaint, Demurrer, Order Sustaining Demurrer, Order Dismissing Action, and Certificate to Judgment Roll.

Notice of Appeal and Proof of Service thereof.

Undertaking on Appeal.

Præcipe to prepare transcript on appeal.

JOHN P. GRAY,
E. C. MACDONALD,
Attorney- for Plaintiff.

Filed July 31, 1912.

(Title of Court and Cause.)

Proof of Service of Notice of Appeal.

STATE OF WASHINGTON,
County of Spokane, ss:

I, Anna L. Vincent, being first duly sworn on oath depose and say: That I am, and was on the dates hereinafter mentioned, a citizen of

the United States, and of the State of Washington, over the age of twenty-one years, and competent to be a witness in the within
90 entitled action, not being the plaintiff therein; that I served the Notice of Appeal herein on Franklin Pfirman, attorney for defendant, by mailing and depositing in the United States Post Office, at the City of Spokane, State of Washington, postage prepaid, a true and correct copy thereof, on the 24th day of July, A. D. 1912, addressed to Wallace, Idaho.

ANNA L. VINCENT.

Duly verified.

Filed Aug. 1, 1912.

STATE OF IDAHO,
County of Shoshone, ss:

I, John P. Sheehy, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, do hereby certify the foregoing Transcript on Appeal was compiled and bound under my direction as a true and correct transcript of the proceedings therein contained.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Wallace, Idaho, this 25th day of September, A. D. 1912.

[Seal District Court, First Judicial District, Shoshone County, State of Idaho.]

JOHN P. SHEEHY,
Clerk District Court.

91 I, John P. Gray, one of the attorneys for the appellant in the above entitled action, do hereby certify that I have carefully examined the foregoing Transcript on Appeal, that the same contains all the papers specified in the Præcipe for such transcript, and I believe it to be prepared and arranged in every respect in accordance with the rules of the Supreme Court of the State of Idaho.

____ ____,
One of the Attorneys for the Appellant.

Service of the foregoing transcript accepted and the receipt of a true copy thereof admitted this — day of September, A. D. 1912.

____ ____,
Attorney for Respondent.

92 (Copy.)

In the Supreme Court of the State of Idaho.

OLYMPIA MINING & MILLING COMPANY, LIMITED, a Corporation,
Appellant,
vs.
ABNER G. KERNS, Respondent.

Motion to Dismiss.

Comes now the respondent in the above entitled action and moves the Court to dismiss the appeal herein for the reasons that appellant has not complied with the laws of this state nor with the rules of this court in perfecting the appeal herein in the following particulars:

I.

Appellant failed to file with the clerk of the district court a præcipe for transcript within five days from the filing of the notice of appeal.

II.

That the transcript on appeal was not filed in this court within sixty days after the perfecting of said appeal.

III.

That the transcript on appeal has not been served on respondent.

IV.

That appellant did not pay to the clerk of the district court the fees required for the transcript, or the fee for certifying and transmitting the same to the Clerk of this court, or the sum required by the rules of this court as a deposit to cover costs of appeal, within five days from the date of filing the notice of appeal.

FRANKLIN PFIRMAN,
Attorney for Respondent; Residence and Post-office Address, Wallace, Idaho.

Endorsed: Filed Oct. 7, 1912, I. W. Hart, Clerk.

93 *Record Entries.*

(Judgment on Motion.)

LEWISTON, IDAHO, October 7, 1912.

SUPREME COURT,
State of Idaho, ss:

Court met pursuant to law.

Present:

Hon. George H. Stewart, Chief Justice,
Hon. James F. Ailshie, Justice,
Hon. Isaac N. Sullivan, Justice, and the officers of the court, when the following proceedings (among others) were had, to-wit:

No. 2116.

OLYMPIA MINING & MILLING CO., LTD., Appellant,
vs.
ABNER G. KERNS, Respondent.

In this cause counsel for respondent files and presents to the court his motion to dismiss the appeal herein, together with the certificate of the clerk of the court below, and good cause appearing therefor, it is ordered that the appeal in the above entitled cause be and the same hereby is dismissed.

94 Copy.

In the Supreme Court of the State of Idaho.

OLYMPIA MINING & MILLING COMPANY, LTD., Plaintiff and Appellant,
vs.
ABNER G. KERNS, Defendant and Respondent.

Petition.

The petition of the Olympia Mining & Milling Company, Ltd., a corporation, the appellant herein, respectfully shows as follows:

I.

That it is the appellant in an appeal in the above entitled action from the District Court of the County of Shoshone in said State.

II.

That while the said appellant, in good faith, supposed it had taken an appeal to this court in the manner required by law, on motion

of the above named respondent the said appeal was dismissed in this court on October 6, 1912.

III.

That this appellant, so far as its personal efforts are concerned and all that could be required of it to be done, did everything within its power and everything required of it to make and perfect said appeal and if in the making and taking of said appeal there was any defect, inherent or otherwise, it was without the fault of this appellant.

95

IV.

That this appellant employed competent attorneys duly licensed by this court and regularly authorized to practice in this court, and before this court, to attend to its business of the making, taking and perfecting the said appeal; and that because of the fault, oversight and gross negligence of the said attorneys, although the said appellant had done everything necessary and within its power to perfect said appeal and to secure a hearing before this court, the said appeal was not taken, made and perfected according to the rules of this court and the same was dismissed, as aforesaid, on October 6, 1912.

V.

That because of no fault of its own this appellant has not had its day in court, has been denied justice in said cause, through no fault of its own and the protection of the laws of the state of Idaho have been denied to it.

Wherefore, this appellant, Olympia Mining & Milling Company, Ltd., prays that the said order dismissing said appeal may be vacated, the said appeal reinstated to the end that it may have a hearing upon the merits of its said appeal.

This petition is based on the affidavit of Clarence Cunningham, hereto attached, marked Exhibit "A," and made a part hereof, and the several other affidavits and papers also hereto attached, marked Exhibit- "A," "B," "C," "D," and "E," and made a part hereof.

OLYMPIA MINING & MILLING COMPANY, LTD.,
By CLARENCE CUNNINGHAM,
President.

CHARLES E. MILLER,
FEATHERSTONE & FOX,
Wallace, Ida., Counsel for Appellant.

96 EXHIBIT "A" TO PETITION.

In the Supreme Court of the State of Idaho.

OLYMPIA MINING & MILLING COMPANY, LTD., Plaintiff and Appellant,
vs.
ABNER G. KERNS, Defendant and Respondent.

Copy.

Affidavit.

STATE OF WASHINGTON,
County of King, ss:

Clarence Cunningham being duly sworn according to law deposes and says as follows, to-wit:

I.

That he is the president of the plaintiff Appellant herein—the Olympia Mining & Milling Company, Ltd., and as such president is the chief executive officer thereof and from the time of the organization of the said company he has had the active management of the same.

II.

That as the president of the said appellant this affiant employed Messrs. John P. Gray of Cœur d'Alene, Idaho and Messrs. Cain & Macdonald of Spokane, Washington, to take an appeal to the Supreme Court of the state of Idaho in the above entitled action, a demurrer to the said complaint having been sustained by the Judge of the court below; that this affiant stood ready at all times and constantly remitted upon notice or demand from the attorneys of said appellant, all such sums as were necessary for the purpose of prosecuting the said litigation and securing the rights of the
97 said appellant corporation; that from time to time as hereinafter more particularly specified, upon the request and demand of Mr. E. C. Macdonald, one of said attorneys, this affiant has, as president of the appellant corporation, remitted such sums as were required to carry on said litigation; and that this affiant otherwise than as hereinafter specified, at no time had any notice that any funds, except as he had already remitted, were required for the purpose of taking and perfecting the appeal herein, to do which, as president of said corporation, he stood ready at all times.

III.

That this affiant personally paid to the said E. C. Macdonald the sum of Fifty-three and 50/100 ($53.50) Dollars, being the full amount required and demanded by him for the purpose of paying

the expenses and costs of the said appeal—the said E. C. Macdonald having represented to said affiant that he had paid the expenses of said appeal.

IV.

That on July 31, 1912, this affiant, as president of said appellant corporation, was notified by the said E. C. Macdonald that said appeal had been perfected, as will more fully appear by letter of the said E. C. Macdonald hereto attached, marked Exhibit "B" and made a part hereof, and this affiant, as president of said corporation, relying on the truth of said statement and believing that said appeal had been perfected gave himself no further concern about same.

V.

That although the said appellant acting by and through this affiant had paid all expenses necessary to perfect said appeal and much in excess of that amount, this affiant is now informed that said appeal was not perfected and filed according to the rules of this court and that the same was dismissed by this court, by its
98 order and judgment of October 6, 1912, and that the said appellant and its officers were not in fault; were not to blame for the reasons for dismissing said appeal but that the same was due entirely to the fault and negligence of its said attorneys.

VI.

That the litigation between this appellant and the said respondent began the latter part of the year 1904 and that during said period the said appellant has paid to its said attorneys, said E. C. Macdonald and associate attorneys, the following sums, upon the dates mentioned in connection therewith, towit:

Fall of 1904:		Filing Fee, Clerk of Court	$13.00
		Attorney fee—J. P. Gray	100.00
		" A. E. Mayhew	110.00
1905.		Certified copy complaint	2.00
		Sheriff fee—serving complaint	3.00
		Witness fees & telephone	13.00
1906,	2/15.	Attorney fees—E. C. Macdonald	500.00
	"	" A. E. Mayhew	100.00
	3/15.	Stenographer—(Libby)	92.50
	5/4.	Sundry expenses	4.25
	5/23.	Attorney fee—A. E. Mayhew	100.00
	11/1.	Brief on Appeal	46.50
		Clerk fees & costs	26.13
1907,	1/8.	Attorney fees—Allen	100.00
	1/10.	Costs—Sheriff	455.13
	2/6.	Attorney fees—E. C. Macdonald	100.00
	4/20.	Expense—Hearing at Wallace	130.45
	7/1.	Attorney fees—Heitman	150.00
		" E. C. Macdonald	150.00
	9/24.	Expense—Printing Brief	50.00

1909,	1/8.	Abstracts of Title	44.00
		Clerk's cost	4.90
	2/4.	Attorney fees—E. C. Macdonald	400.00
	9/1.	" "	150.00
	11/9.	Expense suit at Spokane	100.00
	11/23.	Attorney fees—E. C. Macdonald	250.00
	"	" A. E. Mayhew	45.00
	12/15.	Snow-Borden, printers	12.25
		Attorney fee—E. C. Macdonald	100.15
1910,	5/21.	Attorney—expense to Seattle	50.00
	5/27.	E. A. Kane—stenographer	119.25
	7/6.	Expense E. C. Macdonald to Seattle	35.00
	7/19.	Title Guar. & Surety Co	49.10
	8/16.	Chas. Johnston—printing Brief	45.37
1911,	12/22.	Costs in Appeal (E. C. Macdonald)	45.00
1912,	4/3.	Expense E. C. Macdonald—Wallace	28.05
	4/30.	" " Cœur d'Alene	10.00
	5/11.	Costs—E. C. Macdonald	225.00
	9/27.	" "	100.00
		" "	53.50
	Total		$4,112.53

99

VII.

That this affiant as president of said appellant corporation, in good faith, paid all the sums mentioned in the above paragraph, on demand and in full, and that this affiant as the active executive officer of said appellant corporation has never, at any time, refused or neglected to pay such sum or sums as were necessary for the purpose of carrying on any litigation in which said appellant was involved.

VIII.

That the said respondent Abner G. Kerns is by profession an attorney at law and is a member and officer of this court.

IX.

That this affiant as president of the said appellant corporation was not only personally interested in the affairs of said corporation, having invested considerable amounts of money of his own, but had through his personal influence secured the co-operation of friends and men of means and induced them to invest therein; that this affiant was even more solicitous on account of those whom he had induced to invest in said enterprise than on his own account and that he constantly urged the said attorneys to use the utmost care and vigilance in prosecuting the said action and in enforcing the rights of said corporation in the courts.

X.

That since the said October 6, 1912, this affiant as president of said appellant corporation has repeatedly written to the said E. C.

Macdonald as to said litigation and the results thereof, to which said written inquiries the said E. C. Macdonald has failed to reply; and that at least three different times this affiant attempted to see the said E. C. Macdonald personally at his law office and
100 usual place of business in the city of Spokane and in addition thereto made an appointment by telephone to meet him, the said E. C. Macdonald, which said appointment he, the said E. C. Macdonald failed to keep and this affiant has been utterly unable to meet the said Macdonald, personally, or to hear from him by letter with reference to said litigation.

CLARENCE CUNNINGHAM.

Subscribed and sworn to before me this 16th day of December, 1912.

[NOTARIAL SEAL.] A. B. JONES,
Notary Public in and for the State of Washington, Residing at Seattle.

101 Copy.

EXHIBIT "B" TO PETITION.

Exhibit "B."

SPOKANE, WASHINGTON, July 31, 1912.

Clarence Cunningham, Esq., Washington Apartments, Seattle, Washington.

MY DEAR CLARENCE: We have perfected the appeal in the Olympia case by giving Notice of Appeal and filing the bond. All these papers have had the approval of Mr. Gray. We are now having prepared the transcript on appeal.

I had a very, very vivid dream last night, which I devoutly trust may come true. I dreamed that the case had been argued, and that one morning I opened my mail and found a copy of the opinion, which was entirely in our favor. I distinctly remember that I could hardly believe my eyes, and read the opinion three times to make certain that I understood it. Just then you came in, and there were certainly mutual felicitations. I do not know of anything in the world that would give me more satisfaction than to win this case. While we were cavorting around congratulating each other certain of our friends came in and thought we were crazy until we told them that we had been litigating this case for seven years. Then they all joined in the festivities.

With kindest regards, I am

Yours sincerely,
(Signed) E. C. MACDONALD.

E. C. M.—V.

102 **Copy.**

EXHIBIT "C" TO PETITION.

In the Supreme Court of the State of Idaho.

OLYMPIA MINING & MILLING COMPANY, Appellant,
vs.
ABNER G. KERNS, Respondent.

STATE OF WASHINGTON,
County of Spokane, ss:

E. C. Macdonald, being duly sworn, according to law, on said oath deposes and says as follows:

1. That he was one of the attorneys for the appellant in the above entitled cause and had charge of the same.

2. That an appeal, as provided by law, was taken in the above entitled cause from an adverse judgment by the court below and the same was perfected on July 26th, 1912.

3. That on August 6th, 1912, this affiant, as attorney for said appellant, prepared and filed with the Clerk of the District Court for the county of Shoshone, from which said appeal was taken, a precipe for a transcript of all proceedings in said cause on said appeal, and that this affiant, with said request, requested said
103 clerk to advise him as to the cost of the transcript, and requested that he be advised as to such cost of the same whereupon he, this affiant, would remit the same; a copy of which said request and letter to said clerk is hereto attached and marked Exhibit A and made a part hereof.

4. That so soon thereafter as this affiant was advised of the cost of said transcript, to-wit, on September 24th, 1912, as attorney for said appellant, he forwarded to the clerk of said District Court of Shoshone County a check in the sum required by said clerk, to-wit in the sum of Forty Dollars ($40), which said original check is hereto attached and marked Exhibit B and made a part hereof.

5. That the said check, Exhibit B, was duly received by the clerk of said court of Shoshone County, by him cashed in the usual manner and the same was duly paid on the order of said clerk on presentation to the bank upon which the same was drawn.

6. That the said appellant, Olympia Mines & Milling Company, has always stood ready to pay, and has paid, on demand, and frequently, voluntarily, upon its own suggestion, all moneys and funds which were necessary to carry on said litigation; and that, wherever the fault may be, if any, for delay in the above entitled cause, it was never, at any time, the fault or neglect of the said appellant or of any of its executive or administrative officers.

104 7. That neither this affiant nor either of the other attorneys for appellant at any time intended to violate any of the rules of this court, or to obstruct the examination of the record herein, and that so far as this affiant knows, no notice of a motion to

dismiss the appeal herein was ever served upon any of the attorneys for the appellant or upon the appellant itself, and so far as this affiant is advised, as the principal counsel for appellant, the same was entirely ex parte.

E. C. MACDONALD.

Subscribed and sworn to before me this 21st day of December, 1912.

[NOTARIAL SEAL.] JOHN SALISBURY,
Notary Public in and for the State of Washington,
Residing at Spokane, Wash.

105 EXHIBIT A TO AFFIDAVIT OF E. C. MACDONALD.

August 6, 1912.

Hon. John P. Sheehy, Clerk District Court, Wallace, Idaho.

DEAR SIR: Enclosed herewith please find Precipe in the case of Olympia Mining & Milling Company vs. Kerns.

I wish that you would be kind enough to let me have a statement of the amount of money required to be deposited with you, and I will have Clarence Cunningham send you check for the same immediately.

Yours very truly,

——— ———.

E. C. M.

Encl.

106 Copy.

EXHIBIT B TO AFFIDAVIT OF E. C. MACDONALD.

No. 398.

Cain & Macdonald, Lawyers.

SPOKANE, WASH., Sept. 24, 1912.

Pay to the order of John P. Sheehy, Clerk, $40.00 Forty Dollars.

CAIN & MACDONALD.
(Sgd.) By E. C. MACDONALD.

The Traders National Bank, Spokane, Washington.

Endorsements: Pay to the order of the First National Bank of Wallace. John P. Sheehy, Clerk. Pay Traders National Bank, Spokane, Wash., or order. Prior endorsements guaranteed. 92-55 First National Bank 92-55 Wallace, Idaho. J. W. Wimmer, Cashier.

(Perforated:) Paid.

107 Copy.

EXHIBIT "D" TO PETITION.

In the Supreme Court of the State of Idaho.

OLYMPIA MINING & MILLING COMPANY, LIMITED, a Corporation, Appellant,
vs.
ABNER G. KERNS, Respondent.

Affidavit of Charles E. Miller.

STATE OF IDAHO,
County of Shoshone, ss:

Charles E. Miller being first duly sworn on his oath, deposes and says: That he is a member of the Bar of this Court; that on the 23rd day of November, 1912, he was employed by the Olympia Mining & Milling Company, Limited, the appellant herein, to prosecute a motion to reinstate an appeal perfected in the above entitled action on the 26th day of July, 1912, from an order dismissing the said action made by the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, and which said appeal was, on the 6th day of October, 1912, dismissed by this Court under the rules of this Court, said dismissal being made upon an exparte motion of respondent; in this behalf affiant further says that he is advised and believes, and on such information and belief states it to be a fact that one E. C. McDonald, an attorney of
108 Spokane, Washington, Oscar Cain of the same place and John P. Gray of Cœur d'Alene, Idaho, heretofore attorneys of record in said action, have been discharged and have withdrawn from the case and are no longer connected therewith, and that the sole attorneys now representing the appellant in this action and who will prosecute the said motion to reinstate said appeal are your affiant and Messrs. Featherstone & Fox of Wallace, Idaho.

Affiant further says that he first learned of this action and its pendency in this Court on the 23rd day of November, 1912, at which time Clarence Cunningham, President of said corporation, came to Portland, Oregon, to meet affiant and employed him to prosecute said motion to reinstate said appeal. Affiant further says that since said time he has thoroughly investigated the facts and the law applicable thereto involved in said action and to be presented upon this appeal, and from such investigation states it to be his opinion that said appeal is well founded both in point of fact and law, and in this behalf affiant further says that he believes the said appeal to have been taken and perfected in good faith and believes that upon a proper presentation of the said appeal to this Court in case the same is reinstated, an order will be made by this Court reversing the judgment of the Court below.

Affiant further says that he has carefully investigated the circum-

stances under which the said appeal was taken and the reasons
109 why the transcript on appeal in this case was not filed in this Court within the time required by the rules of this Court, to-wit,—within sixty (60) days from the date that the said appeal was perfected, but was filed in this Court on the sixty-first day after the perfection of said appeal, and from such investigation says that it is his opinion that E. C. McDonald, formerly an attorney of record in this case, is entirely to blame and solely responsible for such non-compliance with the rules of this court. In this behalf affiant says that he has known the said E. C. McDonald personally for a great number of years last past and believes the said McDonald to be insolvent and unable to respond to any damages to the appellant herein for his failure and neglect to properly perfect said appeal; affiant further says that he came to the Cœur d'Alene mining region situated in Shoshone County, Idaho, in the year 1900; that he is well acquainted with the real estate and property in question in this action and that he is well acquainted with the values of mining property in the said County of Shoshone; and that he is credibly informed and believes that the value of the property in litigation in this action is more than One Hundred Thousand Dollars ($100,000).

CHAS. E. MILLER.

Subscribed and sworn to before me this 28th day of December, A. D. 1912.

[NOTARIAL SEAL.] ALBERT H. FEATHERSTONE,
Notary Public.

110 Copy.

EXHIBIT "E" TO PETITION.

In the Supreme Court of the State of Idaho.

OLYMPIA MINING & MILLING COMPANY, a Corporation, Appellant,
vs.
ABNER G. KERNS, Respondent.

Certificate.

STATE OF IDAHO,
County of Shoshone, ss:

I, John P. Sheehy, Clerk of the District Court of the First Judicial District of the State of Idaho, do hereby certify that the transcript in the above entitled action, after a præcipe had been filed therefor, was prepared and ready, with the exception of my certificate thereto as Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, for transmission to the Clerk of the Supreme Court of the State of Idaho, more than thirty days before the time required by law and the rules of the Supreme Court of the State of Idaho.

I further certify that I repeatedly notified E. C. Macdonald, and

other attorneys of record for the appellant corporation in said action, that said transcript on appeal was ready for transmission, as aforementioned, to this Court, and that I required the fees for preparing, certifying and filing the same in said Supreme Court before transmitting the same to the Clerk of said Court, but no attention was paid to my said communications, and such fees were not paid until a check, dated Spokane, Washington, September twenty-fourth, 1912, was received by me on the twenty-fifth day of September, 1912.

I further certify that immediately upon the receipt of said check I certified the said transcript, and did, on the twenty-sixth day of September, 1912, transmit the same, by prepaid express, to the Clerk of the Supreme Court of the State of Idaho, at Lewiston, Idaho.

111 In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, at my office in the City of Wallace, said County and State, on this twenty-eighth day of December, 1912.

[Seal District Court, First Judicial District, Shoshone County, State of Idaho.]

JOHN P. SHEEHY,
Clerk District Court.

112 Copy.

STATE OF IDAHO,
County of Shoshone, ss:

Carlton Fox being first duly sworn on his oath, deposes and says: That he is one of the attorneys for the appellant, Olympia Mining & Milling Company, a corporation, in the above entitled action and whose name is appended as such attorney to the petition of the said appellant to reinstate the appeal heretofore dismissed herein.

That on the 28th day of December, A. D., 1912, he personally served upon the respondent above named, Abner G. Kerns, at the City of Wallace, Shoshone County, State of Idaho, a true copy of the petition hereunto attached of the said appellant to reinstate the said appeal, by handing to and leaving with the said Abner G. Kerns in person on said date at said place a true and correct copy of the said petition to which were annexed true and correct copies of the exhibits numbered from "A" to "E" both inclusive and annexed to said original petition.

CARLTON FOX.

Subscribed and sworn to before me this 30th day of December, A. D. 1912.

[NOTARIAL SEAL.] ALBERT H. FEATHERSTONE,
Notary Public.

[Endorsed:] Copy. No. 2116. In the Supreme Court of the State of Idaho. Olympia Mining & Milling Company, a Corporation, Appellant, vs. Abner G. Kerns, Respondent. Petition to Reinstate Appeal. Filed Jan. 3, 1913. J. W. Hart, Clerk, by F. J. Millsaps, Deputy. Charles E. Miller, South Bend, Wash., Featherstone & Fox, Wallace, Idaho, Attorneys for Petitioner, Olympia, etc., Mining Co.

113 *Record Entry (Judgment on Petition).*

CŒUR D'ALENE, IDAHO, March 27, 1913.

SUPREME COURT,
State of Idaho, ss:

Court met pursuant to adjournment.

Present: Hon. James F. Ailshie, Chief Justice; Hon. Isaac N. Sullivan, Justice; Hon. George H. Stewart, Justice, and the officers of the court, when the following proceedings (among others) were had, to-wit:

No. 2116.

OLYMPIA MINING & MILLING CO., LTD., a Corporation, Appellant,
vs.
ABNER G. KERNS, Respondent.

This cause having been heretofore heard on motion to reinstate the appeal, now on this day the cause was again called and it is ordered that the motion to reinstate the appeal be granted and the case be heard on its merits at the adjourned term of this court.

114 *Record Entry (Judgment Affirming the Court Below).*

BOISE, IDAHO, September 8, 1913.

SUPREME COURT,
State of Idaho, ss:

Court met pursuant to adjournment.

Present: Hon. James F. Ailshie, Chief Justice; Hon. Isaac N. Sullivan, Justice; Hon. George H. Stewart, Justice, and the officers of the court, when the following proceedings (among others) were had, to-wit:

No. 2116.

OLYMPIA MINING & MILLING CO., a Corporation, Appellant,
vs.
ABNER G. KERNS, Respondent.

This cause having been heretofore heard, submitted and taken under advisement by the court, and the court having fully consid-

ered the same, now on this day the cause was again called, and the decision of the court is delivered by Justice Sullivan, to the effect that the judgment of the lower court be affirmed.

It is therefore considered, adjudged and decreed by the court that the judgment of the District Court of the First Judicial District in and for the county of Shoshone in the above entitled cause be and the same hereby is affirmed.

Costs are awarded to the respondent, in the sum of $39.85.

115 In the Supreme Court of the State of Idaho, July Adjourned Term, 1913.

Opinion of the Court.

Filed Sep. 8, 1913. I. W. Hart, Clerk.

OLYMPIA MINING & MILLING CO., a Corporation, Appellant,
vs.
ABNER G. KERNS, Respondent.

Trust—Formation of Corporation—Declaration of Trust—Conditions Precedent—Contingent Trust—Adverse Possession—Statute of Limitations—Staleness of Demand—Cestui Que Trust—Trustee—Action Against—Repudiation of Trust—Laches.

1. Where a contract is entered into for the purpose of consolidating all of the interest in certain mining claims and thereafter forming a corporation to prospect, develop and work the same, and a declaration of trust is thereafter made in which it is declared that K. holds the legal title to certain mining claims for the use and benefit of a corporation to be thereafter formed, to be named the Olympia Mining Company, "provided, Clarence Cunningham, of the City of Wallace in the County of Shoshone, State of Idaho, or the said corporation, shall comply with the provisions of an agreement in writing dated the 28th day of May, 1901, between the said Clarence Cunningham and the said Kerns," and Clarence Cunningham, or the corporation to be formed, failed, neglected and refused to comply with the provisions of said contract, no trust is created.

2. Said declaration of trust was based on the consideration that Cunningham, or the corporation to be organized, should comply with the provisions of said agreement, and Cunningham having failed to comply with such provisions, Held, that as said
116 trust depended on conditions precedent which were not fulfilled, a trust could not be enforced.

3. As Cunningham and his associates agreed to form the plaintiff corporation "as soon as practicable" after the happening of a certain event, and as they failed and refused to organize such corporation within the time stipulated and until about eight years thereafter, Held, that said contingent trust never ripened into an existing or continuing trust.

4. Where an agreement contains conditions to be performed by the beneficiary, or some person for him, the beneficiary can enforce the trust only upon the performance of such conditions.

5. Express as well as implied trusts may be repudiated by adverse possession, and if repudiated, the statute of limitations begins to run from the time the beneficiary has notice of such repudiation.

6. Where the cestui que trust has inexcusably and unreasonably delayed asserting his rights, a court of equity may refuse to enforce a trust on the ground of laches.

7. The doctrine of laches applies to the enforcement of an express trust only when there has been an open breach or repudiation of the trust or assertion of adverse title by the trustee which is so brought home to the actual or constructive knowledge of the cestui que trust as to require him to assert his rights.

8. The general rule is that length of time is no bar to a trust, clearly established, and that express trusts are not within the statute of limitations, but that rule is subject to the qualification that time begins to run against a trust as soon as it is openly disavowed by the trustee, which disavowal or repudiation is clearly and unequivocally made known to the cestui que trust.

117 9. Held, that where the character of the property is such that it is liable to sudden fluctuations in value, such as mining claims, time is generally of the essence of the contract.

Appeal from the District Court of the First Judicial District in and for the County of Shoshone—Hon. W. W. Woods, Judge.

Action to Enforce a Trust. Demurrer to Complaint Sustained and Judgment of Dismissal Entered. Judgment Affirmed.

Featherstone & Fox and Chas. E. Miller for appellant.
Franklin Pfirman and J. H. Forney for respondent.

118 SULLIVAN, *J.:*

This action was brought by the Olympia Mining & Milling Co., the cestui que trust or beneficiary, against the defendant as trustee, to enforce an alleged express trust in land. There was a demurrer to the complaint which was sustained by the court below and judgment of dismissal entered, from which judgment this appeal was taken, the sole question being, Does the complaint state a cause of action and is the cause of action sought to be stated barred by the several statutes of limitations of this state?

This suit was originally commenced on May 29, 1905, by Clarence Cunningham's causing a complaint to be filed in the lower court by the Olympia Mining Company, a Washington corporation, and the decisions rendered in that case by this court on appeal were reported in 13 Ida. 514, and 15 Ida. 375. On May 28, 1909, Clarence Cunningham caused another action to be commenced in the name of the Olympia Mining & Milling Co., Ltd., the same plaintiff as in this action, against the respondent Kerns, involving the same

subject-matter. The respondent appeared in that action by demurrer on substantially the same ground as stated in the demurrer in this action. On June 7, 1909, after the hearing, the demurrer was sustained by the trial court. Thereafter on June 27, 1909, the plaintiff, the appellant here, amended its complaint, alleging substantially the same matters and things set up in the complaint in this action. Thereafter, upon the defendant's filing a demurrer to said amended complaint on substantially the same grounds as the demurrer in this action and noticing the same for hearing, the demurrer was sustained and the action was dismissed. In the month of August, 1909, the appellant commenced another suit on the same cause of action in the Superior Court of Spokane county, state of Washington, and procured service on the defendant
119 while he was temporarily in the jurisdiction of that court. In November, 1909, the case was heard upon its merits and judgment of dismissal entered. Thereafter on August 11, 1911, on appeal by the plaintiff, the decision of the lower court was affirmed by the Supreme Court of Washington (117 Pac. 260).

In the complaint in this action, after alleging the corporate existence of the plaintiff and of the Federal Mining & Smelting Co., one of the defendants, it is alleged that on May 28, 1901, the defendant entered into an agreement with Cunningham in words and figures as follows:

"This agreement, made and entered into on the 28th day of May, 1901, by and between Clarence Cunningham, party of the first part, and A. G. Kerns, party of the second part, all of the City of Wallace, County of Shoshone, State of Idaho,

"Whereas, the estate of Edwart T. Elom, deceased, is the owner of an undivided 5-8th of the 'Olympia,' 'Seattle,' 'Portland,' 'Olympia Fraction' and 'Alice'; and an undivided ½ of the 'Darling,' 'Pacific,' 'Rose,' 'Lincoln,' and 'Diamond Fraction' lode mining claims situated in Placer Center and Leland Mining Districts, in the County of Shoshone, State of Idaho, lying between the Mammoth and Sixteen to One mines, and south of the Custer Mine; and the party of the second part is the owner of the other portions of the said mining claims except the Rose and Lincoln; and

"Whereas, the party of the second part as such co-owner has petitioned the probate court for an order for the sale of the interest of the estate of said deceased in said mining claims, and said petition is to be heard on the 3rd day of June, 1901, and it is anticipated that an order for the sale of said property will be made; and

"Whereas, it is the desire of the parties hereto to purchase
120 the interests of said estate in said properties if the same can be bought for a reasonable sum and upon reasonable terms; for the purpose of consolidating all of the interests therein and forming a mining corporation to prospect, develop and work said mining claims; and

"Whereas, the party of the first part is about to leave the State of Idaho, expecting to be absent for a period of two months, more or less, and the sale of said premises may occur during said period;

"It is therefore hereby mutually agreed that the party of the

second part shall offer to purchase and purchase the interest of the estate of said decedent in said mining claims, if the same can be purchased for the appraised value of said premises, or any less sum; and that the party of the first part will assume and be responsible for the bid and purchase of the party of the second part, and furnish the necessary money to make such purchase at the time when called for by the party of the second part.

"And in consideration of the premises and the services to be so rendered by the party of the second part, it is further mutually agreed that said party of the second part shall be entitled to one-tenth of all of said mining claims, in which he at present has no ownership.

"And it is further mutually agreed that upon the formation of the corporation hereinbefore referred to, which corporation is to be formed as soon as practicable after making said purchase, the party of the second part shall have and be entitled to one-tenth of the stock of said corporation, which stock shall be fully paid up, and non-assessable until after all of the other nine-tenths of the stock have paid ten cents per share to said corporation for the development of said mining claims.

121 "And as a further consideration the party of the second part hereby agrees to do and perform on each of said mining claims the assessment work required for the year 1901, free of expense to the party of the second part.

"And as a further stipulation the party of the second part agrees to convey to the party of the first part, or his assigns, all his rights, title and interest in said mining claims for the sum of five thousand dollars to be paid upon completion of the purchase of the interest of said estate in the premises or sooner.

"Witness our hands and seals this 28th day of May, 1901.

"CLARENCE CUNNINGHAM.
"A. G. KERNS."

It is then alleged that in pursuance of said agreement, the defendant procured the necessary probate action in the said Elom estate and purchased the said interest of that estate on the 20th of June, 1901, on a bid of $2,500 upon which he paid the sum of $500 in cash and executed his promissory note in the sum of $2,000 due in one year or as soon as said mining claims could be entered for patent, and executed a mortgage on said interest to secure said deferred payment; that said sale was duly confirmed by the probate court; that pursuant to said agreement, said Cunningham entered into possession of said mining claims and procured a large number of persons to associate themselves together with him for the purpose of expending money in the development thereof and for organization and incorporation of a company for the purpose of acquiring the title thereto and working said claims; that representing himself and his associates, he expended approximately the sum of $26,000 in developing and working said mining claims and paid to the defendant for his personal interest in said claims the sum of

122 $4,100.00; that said Cunningham furnished the defendant the sum of $500 paid by the latter on the purchase price of

said Elom's interest; that all of said money was furnished and paid to the defendant by said Cunningham and his associates, the predecessors in interest, organizers and stockholders of the plaintiff corporation, according to the terms of the agreement above set forth, and that the defendant had the title of said Elom estate and held it for the corporation provided to be formed under said agreement, and that it was understood and agreed by and between the defendant and Cunningham and his associates that their successors in interest, the corporation to be formed, would furnish the additional money necessary to pay the said mortgage when it became necessary to pay the same in order to protect said trust estate; that after receiving the deed from the administratrix for the Elom estate interest, the defendant on August 17, 1901, made, executed and delivered his declaration of trust in words and figures as follows:

"Declaration of Trust.

"I, A. G. Kerns, of the City of Wallace, County of Shoshone, State of Idaho, do hereby declare and acknowledge that I hold the legal title to the following interests in certain mining claims in trust for the use and benefit of a corporation to be hereafter formed and to be named the Olympia Mining Company, provided, Clarence Cunningham, of the City of Wallace, in the County of Shoshone, State of Idaho, or the said corporation, shall comply with the provisions of an agreement in writing dated the 28th day of May, 1901, between the said Clarence Cunningham and the said A. G. Kerns."

That thereafter the defendant in his own name, but in fact as trustee and agent for the corporation, provided to be formed
123 by said agreement, and referred to in said declaration of trust, applied for and procured patents to said lode mining claims and the said Cunningham and his associates, organizers of the plaintiff corporation, furnished and paid all of the expenses of procuring patents for said mining claims; that said Cunningham and his associates continued to expend money in the development of said mining claims up to about March 1, 1903; that on or about March 20, 1903, said Cunningham and his associates caused a corporation to be organized, under the laws of the state of Washington, named "Olympia Mining Company;" that the defendant consented to the organization of the Washington corporation, subscribing for a portion of the capital stock of the same and paid the sum of $50 upon such subscription, and thereafter the said corporation complied with the laws of the state of Idaho authorizing it to hold mining claims and to do business in the state; that in the year 1903, because of large expenditures already made by said incorporators on behalf of said mining claims, there was not sufficient money in the treasury of the company to pay said mortgage; that the said Cunningham then made an arrangement on behalf of himself and his associates, with J. G. Cunningham, F. Cushing Moore and Francis E. Jenkins, who were among the associates of said Cunningham, that in case payment of said mortgage should be in-

sisted upon, they would advance the money for the payment of the same, of which arrangement the said Cunningham notified the defendant and directed the latter in case payment of said mortgage was insisted upon to call upon said parties for the money to pay the said mortgage and the defendant agreed to comply with said direction; that on or about June 1, 1903, an action was commenced to foreclose said mortgage; that the defendant did not notify said Cunningham or his associates or any of them, of said foreclosure proceedings, but permitted a decree of foreclosure to be entered on July 28, 1903, directing the sale of said mining claims upon
124 such foreclosure; that on or about August 24, 1903, the date fixed for the sale under said decree of foreclosure, the said J. G. Cunningham, having in the meantime learned of the said decree, for the purpose of protecting said Clarence Cunningham and his associates, and according to the agreement heretofore referred to, advanced the money and bid in the said property at said sale, in his own name but for the benefit of the said Clarence Cunningham and his said associates and the corporation to be formed under the terms of said agreement, and received the sheriff's certificate of sale, holding the same in trust, to be assigned and transferred to the said Clarence Cunningham and his associates, upon repayment of the said amount paid by him, all of which was then well known to the defendant; that on August 18, 1904, the defendant, in violation of his said trust and with intent to cheat and defraud the plaintiff, sold and conveyed to one William J. Hail an undivided one-fourth interest in said mining claims for the sum of $3,300 and redeemed the said property from said sale by paying to the sheriff of said county the amount for which the said property had been sold, with interest and costs, and the defendant at the same time entered into an agreement with the said Hall to convey to him the remaining interests in said mining claims; that the said Olympia Mining Company, its officers and stockholders and said Clarence Cunningham, had no knowledge whatsoever of said conveyance to, and agreement with, said Hall until during the month of November, 1904; that the first knowledge of such transfer obtained by any of said persons was in said month received by said Clarence Cunningham and was the first time that any of said persons knew that the defendant had repudiated his said trust and claimed to hold said mining claims as his own and adversely to said persons; that
125 at the time of said sale and conveyance of said one-fourth interest to the said Hall and the agreement to convey the remainder to him, the said Hall well knew that the defendant held the legal title thereof in trust for the plaintiff and the said Hall had full notice of the rights of plaintiff; that at the time of his said purchase and agreement, the said Hall was acting as the agent of the said Federal Mining & Smelting Company, which concern furnished the said sum of $3,300 which was paid to the defendant by the said Hall, well knowing that the defendant held the said property as trustee, without any right in law or equity to sell the same; and that, previous to the commencement of this action the said Mining & Smelting Company reconveyed all its title to

said property to defendant, and it, as well as said Hall, now disclaims any interest therein; that on May 20, 1905, the said Olympia Mining Company, incorporated under the laws of the state of Washington, as aforesaid, demanded from defendant a deed transferring the said mining claims to it and tendered the defendant the sum of $900.00 in gold coin of the United States, the balance due him on the purchase of his personal interest therein and at the same time tendered him Certificate No. 20 for 100,000 shares of the capital stock of the said Olympia Mining Company, which said certificate of stock was issued and certified to be paid up to the amount of ten cents per share, for all that was due to the defendant under his original contract with Clarence Cunningham and for his services as an attorney rendered in securing the titles and patenting said mining claims, which said demand and tender the defendant refused and rejected; that such refusal to execute and deliver a deed or conveyance was the first time that the defendant, Kerns, directly repudiated his said trust to said Olympia Mining Company or to any of the officers or stockholders or to said Clarence Cunningham,
126 and was the first time that said Kerns, directly to said persons, claimed to own such mining claims adversely to them and was the first actual notice thereof received directly by them from the defendant, and thereupon the said corporation did, on or about May 29, 1905, commence its action in the District Court in and for the county of Shoshone against the said defendant and the said Hall and the said Federal Mining & Smelting Company, to enforce specific performance of said agreement and said declaration of trust; that the said defendant appeared in said action and the same was prosecuted by the Olympia Mining Company, to final judgment in its favor in said District Court; that the defendants and each of them appealed from said judgment to the Supreme Court of the state of Idaho, which said appeal was submitted to said court and the said judgment was affirmed; that a rehearing was thereafter granted by the said court and its former decision overruled on January 18, 1907, by which the judgment of the court below was reversed and the said cause was remanded to the latter court for further proceedings, a copy of the opinion of this court being attached to said complaint as an exhibit; that thereafter, to wit, on April 20, 1908, the said cause was dismissed by the said district court; that the plaintiff in that action appealed from said last mentioned judgment to the Supreme Court where the same was affirmed on November 14, 1908 (15 Ida. 371), a copy of the opinion being attached to the complaint as an exhibit; that on or about April 5, 1909, pursuant to the terms of said agreement and declaration of trust, the said Clarence Cunningham and his associates, acting under and in pursuance of said agreement and said declaration of trust, caused to be organized a corporation under the laws of the state of Idaho with a capital stock of one million dollars, divided into one million shares of the par value of one dollar each; that the
127 defendant was duly notified of the said organization and previous thereto was invited and requested by said Clarence Cunningham, on behalf of himself and his associates, to

participate in such organization and to become a member of the board of directors, and to take part in the adoption of a code of by-laws, and generally to participate in the management of the affairs of the corporation, which the defendant has at all times, without reason, failed, neglected and refused to do, although the said Kerns was designated in the articles of incorporation of plaintiff as one of the original seven directors; that plaintiff is now authorized by law to take, hold and convey real estate, to prospect, develop and work mining claims, to transact the business of mining with all incidental powers thereto within the state of Idaho; that the said corporation was created in strict conformity with the terms and conditions of said agreement and the subsequent agreements between the said Clarence Cunningham, his associates and the said A. G. Kerns; that on January 15, 1909, the defendant, in violation of his trust and with intent to cheat and defraud the plaintiff, sold and conveyed the said mining claims by quitclaim deed to one Jerome L. Day; that at the time of said sale, the said Day well knew that said property belonged to plaintiff and that the defendant held the legal title thereto in trust for plaintiff, but the said Day has since reconveyed said property to defendant and now disclaims any interest therein; that in making the said deeds said defendant violated his trust and that such acts of the defendant were in defiance of common honesty and in violation of his trust relations and were for the sole and simple purpose of defrauding the plaintiff; that on the — day of April, 1909, the plaintiff demanded of the defendant a deed, transferring to it all of said mining claims and tendered to the defendant the sum of $1,405 in gold coin of the United States, together with interest thereon to the date
128 of tender, and at the same time tendered to the defendant Certificate No. 11 for one hundred thousand shares of the capital stock of the said Olympia Mining & Milling Co., Ltd., the plaintiff corporation, which said certificate of stock was duly issued by authority of said corporation and which said stock was fully paid up and non-assessable until after all of the other nine-tenths of the stock of said corporation should have paid ten cents per share to the said corporation for the development of the mining claims described, which fact was endorsed thereon in the following words, to wit: "This stock is fully paid up and non-assessable until after all of the other nine-tenths (9/10) of the stock of the Olympia Mining & Milling Company, Limited, shall have paid ten cents per share to said corporation for the development of its mining claims;" that said tender was made to defendant for all due him under the original contract between him and Cunningham and for his services as attorney rendered in securing title and obtaining said mining claims, and that the plaintiff has been at all times since and is now ready and willing to make said payment and delivery to said defendant; that the said mining claims have not changed in condition or value since the year 1903; that the plaintiff herein has heretofore offered to pay to the defendant, any and all moneys which he may have paid for, advanced or disbursed on account of said property or for the benefit thereof, and hereby again offers to do so;

the plaintiff here again offers to do equity to said defendant as may seem just and right to the court, and offers to reimburse the defendant for any and all advancements or disbursements made on any and every account of or for the benefit of the said mining claim, and that plaintiff has no adequate remedy at law.

Plaintiff prays judgment that the court decree that the defendant is the trustee of the plaintiff; that the plaintiff is the owner in equity and entitled to a deed of the said mining claims from
129 the said Kerns and for such other and further relief in the premises as to the court may seem just and equitable.

To this complaint the defendant interposed a demurrer upon the grounds that no cause of action was stated and that the action was barred by the following statutes of limitations: Secs. 436, 450, 454 and 460, Rev. Codes.

To the complaint was attached the decision of this court on a former appeal in this case, which decision was rendered on December 13, 1906, but which was not published in the reports, as thereafter a rehearing was granted and the decision on rehearing is found in 13 Ida. at p. 514, wherein it was held that under the contract between Cunningham and Kerns an Idaho corporation should have been formed and not a Washington corporation, and that the organization of the Washington corporation was not a compliance with said contract.

The case was thereupon remanded to the trial court for further proceedings in harmony with the views expressed in that opinion. When the matter came on for hearing in the trial court, there was no substitution of an Idaho corporation to take the place of the Washington corporation as plaintiff in said action, regardless of the decision of this court holding that said Washington corporation could not maintain this action. The trial court refused to admit any evidence to sustain said cause of action on behalf of the Washington corporation and entered a judgment of dismissal, whereupon an appeal was taken to this court and a decision was rendered on November 14, 1908 (see 15 Ida. p. 371), in which it was again held that said Washington corporation could not maintain this action, and held that the trial court was justified in dismissing said action.

After the second appeal had been determined, Cunningham caused a corporation to be formed under the laws of the state of Idaho. Articles of incorporation were prepared and filed after Kerns
130 had been given notice of the time and place of the organization and of the proposed articles. Thereafter the Idaho corporation, the plaintiff in this action, began suit in Shoshone county, Idaho, against Kerns, raising substantially the same issues as in the former case. Kerns interposed a demurrer to the complaint, which by consent of plaintiff was sustained. An amended complaint was filed, to which a demurrer was interposed, whereupon plaintiff took a voluntary dismissal of the case. The order of dismissal was entered July 13, 1909, in the District Court of Shoshone County. The Idaho corporation having complied with the laws of the state of Washington with reference to foreign corporations therein, on August 23, 1909, began an action in the Superior Court of Spokane County,

state of Washington, which action is substantially the same as the action that had been waged by the Washington corporation in the Idaho courts, in which action said Superior Court held that it had jurisdiction over the defendant but for certain other reasons dismissed the action. An appeal was taken by the Idaho corporation to the Supreme Court of the state of Washington and the judgment of the trial court dismissing the action was affirmed. Said decision was rendered by the Supreme Court of Washington on August 11, 1911 (see 117 Pac. 226).

Thereafter this suit was commenced in the district court of Shoshone county on the 28th of March, 1912, and the demurrer above mentioned to the complaint was sustained by the court on June 8, 1912, and judgment of dismissal entered. From that judgment this appeal was taken.

The order of the court sustaining said demurrer and entering judgment of dismissal is assigned as error. Counsel for appellant presents his assignments of error under three separate heads.

(1) The first contention of appellants is that where a
131 corporation is to be brought into existence by some future act of the incorporators, the franchise remains in abeyance and attaches when such acts are done.

The original agreement between Kerns and Cunningham, above set forth, recites that said agreement is made for the purpose of consolidating all of the interests in said mining claims and forming a mining corporation to prospect, develop and work the same, and in the declaration of trust, above set forth, Kerns declares that he holds the legal title to certain mining claims for the use and benefit of a corporation to be thereafter formed and to be named the Olympia Mining Co., "provided, Clarence Cunningham of the City of Wallace, in the county of Shoshone, State of Idaho, or the said corporation, shall comply with the provisions of an agreement in writing dated the 28th day of May, 1901, between the said Clarence Cunningham and the said A. G. Kerns," that being the contract above referred to.

It appears from the record that said contract was executed on May 28, 1901, and the declaration of trust was signed on August 17, 1901. It is recited in said contract that said corporation was to be formed "as soon as practicable" after Kerns should make the purchase of the five-eighths interest owned by the Elom estate in certain of said mining claims, of which claims Kerns owned the remaining three-eighths interest. Kerns proceeded in accordance with said agreement to purchase the Elom estate interest, which he did on June 20, 1901, at a price of $2,500, paying $500 of such purchase price in cash and executing a promissory note for the balance of $2,000 due in one year, and a mortgage securing the payment of the same. This sale was duly confirmed by the probate court of Shoshone county. But Cunningham wholly failed to keep his part of said agreement by not furnishing the money with which to purchase the Elom
132 estate interest, and by failing to organize the corporation provided for in said contract until April 5, 1909,—nearly eight years after Kerns had purchased said Elom estate interest. Under

the terms of said contract, said corporation should have been organized within a reasonable time after Kerns had purchased the Elom estate interest, and eight years, or thereabouts, was not a "reasonable time" under the facts of this case, in which to organize said corporation and to proceed and take over said mining claims.

The declaration of trust is based on the consideration that Cunningham, or the corporation to be organized, should comply with the provisions of the agreement of the 28th day of May, 1901, and Cunningham having failed to comply with said provisions, the declaration of trust cannot be enforced against Kerns for that reason. Under said contract and declaration of trust, if the plaintiff corporation had been organized within a reasonable time and Cunningham had complied with the provisions of said contract to be performed by him, then the corporation could have enforced the contract and declaration of trust against Kerns. But taking into consideration all of the facts in this case, the litigation that has *be* been had in regard to the matter, as above set forth, and the persistent refusal of Cunningham and his associates to organize such a corporation as said contract contemplated until about eight years after it should have been organized, the plaintiff corporation is not brought within the rule contended for by the plaintiff, to the effect that where a corporation is to be brought into existence by some future act of the incorporators, the franchise remains in abeyance and attaches when such acts are done. If the provisions of the contract and declaration of trust had been complied with within a reasonable time, the defendant could have been compelled to convey the title to said mining claims to such corporation. But when we take into consideration the character of the property involved here—mining
133 claims—eight years is not a reasonable time within which Cunningham and his associates should have organized the plaintiff corporation. Kerns has been denying the right of Cunningham and his associates to enforce said contract persistently for a number of years and Cunningham and his associates have as persistently refused to comply with the terms of said contract to be performed by them. Said document entitled a "Declaration of Trust" was simply an offer on the part of Kerns, based on certain acts to be thereafter performed, and like any other offer, it could be withdrawn or repudiated if Cunningham failed to keep his part of the contract, and as appears from the allegations of the complaint, Kerns did withdraw or repudiate said declaration of trust in 1904,—about eight years prior to the bringing of this action, and five years prior to the organization of the appellant corporation.

We therefore hold that there is no merit in this contention, for the reason that the alleged trust depended upon conditions precedent which were never performed, and for the further reason that the plaintiff corporation was not organized within the time contemplated by said contract.

(2) The second contention of counsel is that the cause of action does not accrue and the statute of limitations begin to run until there is some person in being and not under legal disability who can sue or be sued, and counsel contends that as the appellant corporation

was not organized until April 5, 1909, the statute of limitations could not commence to run until that time.

In this case the fact must not be overlooked that Cunningham had agreed to form the corporation "as soon as practicable" after making the purchase of the Elom estate interest in said mining claims by Kerns, for which purchase Cunningham was to "assume and be
134 responsible for the bid and purchase of the party of the second part, [Kerns] and furnish the necessary money to make such purchase at the time when called for by the party of the second part." The plaintiff corporation endeavors by certain allegations to excuse itself for failure to pay the purchase money for said mining claims and for Cunningham's failure to comply with his part of said contract. If, under the facts of this case, Cunningham and his associates could fail and neglect to pay the money required to be paid by them and could delay the organization of the corporation contemplated by said contract for eight years after the corporation ought to have been organized, and thus prevent the tolling of the statute of limitations, where shall the line be drawn? Might not such statute be avoided or prevented from running for fifty years, or even longer, in like manner?

It is alleged that Kerns refused to join in the formation of such corporation; but his refusal would not excuse Cunningham and his associates from organizing a corporation within a reasonable time or "as soon as practicable" after the purchase of the Elom estate interest, which occurred on June 20, 1901. This is not a case where the interest in certain mining claims have been conveyed to Kerns as trustee, but is a case where Kerns agreed to do certain things, take over the title and hold it in trust for a corporation to be formed, provided Cunningham furnished the money with which to purchase said interest, which Cunningham failed to do. Had Kerns simply taken over the title to said mining claims for the sole purpose of holding it, to be conveyed to a corporation thereafter to be formed, that would present a very different question. But Kerns did not agree to hold said title in trust unless Cunningham performed the part agreed to be performed by him under said contract.

135 Appellant attempts to justify the delay in the formation of the Idaho corporation by showing what was done in the organization of a Washington corporation, the organization of which was held not to be a compliance with said agreement of May 28, 1901. (See Olympia Mining Co. v. Kerns, 13 Ida. 514.) If Cunningham and his associates, against the protest and wishes of respondent, organized a Washington corporation, and thereafter lost some four or five years' time in a vain endeavor to force the defendant to accept that corporation as a compliance with said contract, they certainly must be charged with the consequences of that delay, as this court held on June 18, 1907, that the organization of the Washington corporation was not a compliance with the terms of said contract, and Cunningham and his associates persistently refused, even after that decision, to organize an Idaho corporation in compliance with said contract, until April 5, 1909, nearly two years after said decision was rendered. After the organization of the plaintiff corpo-

ration, Cunningham delayed the commencement of this action until March 28, 1912. The entire record in this proceeding, since the said decision of this court, supra, shows a deliberate attempt to evade and nullify that decision.

Appellant's whole argument and brief depends upon the assumption that the appellant corporation is a person and the cause of action only arose when that person came into being by Cunningham and his associates organizing it. But the fact is, it was their duty, under the original contract, to have organized the plaintiff corporation at least as early as 1904.

It is stated in Morawetz on Private Corporations, sec. 227, that "a corporation is really an association of persons, and no judicial dictum or legislative action can alter that fact." And, "In equity the conception of a corporate entity is used merely as a formula for
136 working out the rights and equities of the real parties in interest. * * * In equity the relationship between the shareholders is recognized whenever this becomes necessary to the attainment of justice; at law this relationship is not recognized at all." See also 1 Thompson on Corporations, 1st ed., Sec. 10. An incorporated company is nothing more or less than an association of individuals acting as a single person by their corporate name.

In Cal. Consolidated etc. Min. Co. v. Manley, 10 Ida., 786, this court, speaking through Mr. Justice Ailshie, said:

"The plaintiff, the California Consolidated Mining Company, a corporation, is only another name for Keane, so far as this transaction was concerned. He was the promoter, principal incorporator, manager and resident director of the company, and notice to him was notice to his alter ego, the corporation."

So in the case at bar: Cunningham and his associates were the promoters, principal managers, etc., of the said corporation. In other words, the Olympia Mining Co., the plaintiff, is merely descriptive in figurative language of Clarence Cunningham and his associates, the same parties who failed to make the payments required by the contract of May 28, 1901; the same parties who brought the suit in the name of the Washington corporation on May 29, 1905; the same parties who knew they attempted to secure title to the Elom estate interest in the Elom mining claims by purchase at the foreclosure sale by J. G. Cunningham, instead of advancing the money to pay for said mining claims as they had agreed to do; the same parties who are responsible for continuing this litigation so many years. All this delay was voluntary, and as we view it, inexcusable. It was in a matter peculiarly subject to the rule, well settled, that delay short of the period of the statute of limitations will
137 defeat an action in equity by reason of the doctrine of laches.

While the Olympia Mining Co., Ltd., of Idaho is named as the plaintiff in this action, it is clear from the record that Cunningham and his associates are the real parties plaintiff and appellant in this case, and it devolved upon them to comply with the original agreement on which this action is founded, and they cannot escape the consequences of their neglect and failure to comply with the

terms of said contract by refusing to organize the corporation contemplated by said contract. The general rule that a cause of action does not accrue and the statute of limitations begin to run until there is some person in being and not under legal disability who can sue or be sued, has no application whatever to this case. There is no merit in said second contention.

(3) The third contention is that in an action by the cestui que trust or beneficiary against the trustee to enforce an express continuing trust, the defense of the statute of limitations or laches is never available to the defendant.

We agree with counsel in that contention, but as we view it, upon the facts in this case, there was not an express, continuing trust. Kerns did not become a trustee to hold the title to said mining claims, for the reason that Cunningham and his associates failed and neglected to comply with the provisions of said original contract upon the performance of which Kerns had agreed to hold the title to said mining claims in trust. The allegations of the complaint show that the provisions of that contract were not complied with, hence there was no "continuing trust" created. The fatal weakness of this third position of appellant is that the trust was not absolute but upon a condition precedent, which condition had not been complied with. It was a contingent trust, depending for its operation upon a future event, that of full compliance with the original
138 agreement. (39 Cyc. 33.) Where the agreement contains a condition to be performed by the beneficiary, he may enforce the trust upon performing the condition, but only in that event. (39 Cyc. 65.)

This court has held in two cases that an express, as well as an implied, trust is repudiated by adverse possession and the statute of limitations begins to run from the time the beneficiary has notice of such repudiation. (Nasholds v. McDonnell, 6 Ida. 377; Coe v. Sloan, 16 Ida. 49.) The alleged trust in the case at bar was never subsisting—never came into full existence, for the reason that the conditions precedent were never performed according to the express requirements of said declaration, and was not recognized by Kerns and was, in fact, repudiated by him in 1904, according to the allegations of the complaint,—nearly eight years before this action was commenced to enforce it.

In Sec. 200, Wood on Limitations, after stating the general rule, the author says:

"But to this rule there is this qualification, and that is, that when the trustee openly disavows the trust, and clearly and unequivocally sets up a right and interest adverse to the cestui que trust, and which is made known to the latter, the statute begins to run in his favor."

The qualification there suggested by the author is supported by numerous authorities cited in the foot-note to that section. Under proper restrictions, equity as well as law favors the diligent. In 39 Cyc. p. 601, after stating the general rule to the effect that ordinarily no mere lapse of time will bar the cestui que trust of his rights in the subject of the trust, as against the trustee, the author states:

"But even in such cases a court of equity may refuse to enforce a trust on the ground of laches and its inability to do complete justice, where, with actual or constructive knowledge of a
139 breach of trust or assertion of adverse rights, the cestui que trust has inexcusably and unreasonably delayed asserting his rights."

Numerous cases are cited by the author sustaining that doctrine, from many different states, the Supreme Court of the United States and from England.

In 39 Cyc. p. 603, the author states:

"The doctrine of laches applies to the enforcement of an express trust only where there has been an open breach or repudiation of the trust, or assertion of adverse title, by the trustee, which is so brought home to the actual or constructive knowledge of the cestui que trust as to require him to assert his rights promptly."

(See also Perry on Trusts, 6th ed., sec. 864; 5 Pomeroy's Equity Jurisprudence, sec. 28.)

The first action to enforce this alleged trust was brought by the Washington corporation on May 29, 1905, on substantially the same grounds as the present suit. That suit was as solemn an acknowledgment of the repudiation of the alleged trust as could be made by Cunningham and his associates. It was alleged in that case that he refused to comply with said trust. Had a corporation been organized in compliance with said agreement and a suit brought in the name of such corporation, at that time, instead of bringing the action in the name of the Washington corporation, such action would not have been barred by the statute of limitations. But that was not done, and the present action was brought nearly seven years after said action had been brought by the Washington corporation, and nearly seven years after the repudiation of the alleged trust was judicially acknowledged by the appellant and its predecessors in interest by the bringing of said action by the Washington corporation. Under the admissions in the complaint, Cunningham and the corporation were in default in 1904, and the respondent Kerns was claiming
140 a forfeiture at that time and was claiming to be the sole owner of said mining claims, and had made a conveyance of a one-fourth interest in the property to one W. J. Hall, and had entered into a written contract for the sale of the remaining three-fourths interest in the property. It is alleged in the complaint that Cunningham first became aware of this claim on the part of Kerns in the year 1904. To be sure, the Idaho corporation was not formed until 1909, when under the express provisions of the contract, Cunningham and his associates should have organized the corporation "as soon as practicable" after Kerns had procured the interest of the Elom estate in and to said mining claims in 1901. The statute of limitations then commenced to run in 1904, when Cunnigham first learned of the claim of respondent to hold title adversely to him. After Cunningham had been informed of that fact, he persistently refused to organize the Idaho corporation until 1909, or about five years after he had full knowledge that Kerns had repudiated said alleged trust.

In the case of Speidel v. Henrici, U. S., 30 L. ed., 718, the court said:

"As a general rule, doubtless, length of time is no bar to a trust clearly established, and express trusts are not within the statutes of limitations, because the possession of the trustee is presumed to be the possession of his cestui que trust. * * *

"But this rule is, in accordance with the reason on which it is founded, and, as has been clearly pointed out by Chancellor Kent and Mr. Justice Story, subject to this qualification: that time begins to run against a trust as soon as it is openly disavowed by the trustee, insisting upon an adverse right and interest which is clearly and unequivocally made known to the cestui que trust; as when,
141 for instance, such transactions take place between the trustee and the cestui que trust as would in case of tenants in common amount to an ouster of one of them by the other."

This is an instructive case and the court declares that where the bill *or* complaint shows on its face that the plaintiff by reason of the lapse of time and his own laches is not entitled to relief, the objection may be taken by demurrer. (See also Raymond v. Flavel (Ore.), 40 Pac. 158.)

Under the facts as alleged in the complaint, Cunningham and his associates could not stop the running or tolling of the statute by refusing to comply with said original agreement in the organization of the corporation, cestui que trust or beneficiary. From the declaration of trust, it clearly appears that one of the conditions precedent to the bringing into existence of such trust was the organization of a holding corporation within a reasonable time after Kerns had purchased the interest of the Elom estate in said mining claims. The authorities both in England and America, where mines and mining property are the subject of contract, hold that time is generally of its essence, independent of any express stipulation in the instrument. 2 Lindley on Mines, 2nd ed., sec. 859; 2 Snyder on Mines, secs. 3676-7; 27 Cyc. 674. And that is the rule in this state. As early as 1886 in the case of Settle v. Winters, 2 Ida. 215, the court held that where the character of the property is such that it is liable to sudden fluctuation of value, time is of the essence of the contract. This rule is especially applicable to mining property." In that case time was not especially stipulated to be of the essence of the contract any more than in the case at bar. (See also Durant v. Comegys, 3 Ida. 204.)

142 The excuses offered and alleged in the complaint are not sufficient to justify Cunningham and his associates in not complying with said contract.

There is no merit in the third contention of appellant for the reason that the complaint does not allege an express and continuing trust. That being true, the defense of the statute of limitations and laches is available to the defendant in this action.

We therefore conclude that the trial court did not err in sustaining said demurrer and entering judgment of dismissal. The judgment is affirmed and costs are awarded to the respondent.

Ailshie, C. J., and Stewart, J., concur.

143 In the Supreme Court of the State of Idaho, — Term.

OLYMPIA MINING & MILLING CO., a Corporation, Appellant,
vs.
ABNER G. KERNS, Respondent.

On an Appeal from the District Court of the First Judicial District in and for Shoshone County.

This cause having been heretofore heard, submitted and taken under advisement by the Court, and the Court having fully considered the same, now on this day the cause was again called, and the decision of the Court is delivered by Justice Sullivan to the effect that the judgment of the lower court be affirmed.

It is therefore considered, adjudged and decreed by the Court, that the judgment of the District Court of the First Judicial District in and for the County of Shoshone in the above entitled cause be and the same hereby is affirmed. Costs are awarded to the respondent, in the sum of $39.85.

I, I. W. Hart, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause, on the 8th day of September, 1913, and now remaining of record in my office.

Witness, my hand and seal of the Court, affixed at my office, this 8th day of September, 1913.

[SEAL.] (Signed) I. W. HART, *Clerk*,
By —— ——,
Deputy Clerk.

[Endorsed:] No. 2116. In the Supreme Court, State of Idaho. Remittitur. Olympia Mining & Milling Co., a Corporation, Appellant, vs. Abner G. Kerns, Respondent. Clerk's Costs $24.85, paid by Appellant $15.00, paid by Respondent $9.85—$24.85.

144 The Supreme Court of the State of Idaho.

OLYMPIA MINING & MILLING COMPANY, LIMITED, Plaintiff and Appellant,
vs.
ABNER G. KERNS, Defendant and Respondent.

Petition.

To the Honorable James F. Ailshie, Chief Justice of the Supreme Court of the State of Idaho:

The petition of the Olympia Mining and Milling Company, Limited, respectfully shows: That heretofore, to-wit, upon the 8th day of June, A. D., 1912, there was tried in the District Court of

the First Judicial District of the State of Idaho in and for the County of Shoshone, a case in which your petitioner was plaintiff and Abner G. Kerns was defendant.

The complaint of your petitioner, the plaintiff in this case, was one to enforce an express trust in land brought against the defendant as a trustee and in favor of your petitioner as a cestui que trust, and it was therein alleged that the defendant and one Clarence Cunningham, by an agreement in writing of date May 28th, 1901, had acquired ten certain lode mining claims situate in said County of Shoshone, the defendant to contribute certain services in the procuring of title to same and his own personal interest in said mining claims and the said Cunningham to furnish the necessary capital to purchase said claims, with the avowed intention of forming a corporation thereafter for the prospecting, developing and working of said mining claims, and that, in pursuance of said agreement the said Cunningham, acting for himself and
145 certain associates, and the defendant secured the title to said mining claims, whereupon, the defendant in writing, under seal and duly acknowledged, of date August 17, 1912, declared and acknowledged that he held the legal title to the said ten mining claims, describing them, in trust, for the use and benefit of a corporation to be thereafter formed and to be named the Olympia Mining Company; and it was further alleged, in said complaint the said Cunningham had fully complied with all of the terms of his said agreement with defendant, or tendered fully performance of every act required to be done on his part but that, ignoring these facts, and although the said Cunningham and his associates had on or about April 5, 1909, incorporated the corporation referred to in said declaration of trust under the laws of the State of Idaho, the defendant refused to execute said trust and to convey said mining claims to such corporation, your petitioner herein, and, then and there, set up and declared title to said mining claims in himself, repudiating his said trust.

Upon the trial of said case in said District Court, the defendant demurred, both generally and specially, to your petitioner's said complaint therein, upon the following grounds, namely:

1. That this Court has no jurisdiction of the subject matter of this action.

2. That the complaint does not state facts sufficient to constitute a cause of action.

3. That the complaint is uncertain in not showing that Clarence Cunningham kept or performed his part of the agreement of May 28, 1901, and in not showing any valid excuse for his failure to keep his part of the said contract.

4. That the cause of action is barred by the provisions of Section 4036 of the Revised Codes of Idaho. (5 years)

146 5. That the cause of action is barred by the provisions of section 4052 of the Revised Codes of Idaho. (5 years.)

6. That the cause of action is barred by the provisions of section 4054 of the Revised Codes of Idaho. (3 years.)

7. That the cause of action is barred by the provisions of section 4060 of the Revised Codes of Idaho. (4 years.)

Which said demurrer was sustained by said court; and thereafter there was a judgment in said court in favor of the defendant, and against your petitioner and dismissing your petitioner's said action; whereupon your petitioner took an appeal from said judgment to the Supreme Court of the State of Idaho, that being the highest court of law or equity of the said state in which a decision could be had in said case, assigning therein as error the sustaining of said demurrer in said case by said District Court of Shoshone County, and the judgment of said Court dismissing said case, in favor of the defendant and against your petitioner.

The several grounds of said demurrer are hereinbefore copied and set out in extenso and your petitioner shows that each of said grounds raised and presented a Federal question in said case, namely:

First. Whether the said declaration of trust constituted a contract between the defendant as the trustee of an express trust and your petitioner, then, yet and in the future, to be created a corporation, as in said declaration provided, and the rights of your petitioner under the declaration of trust remained suspended and in abeyance until it, your petitioner, should be duly created a corporation and whether the operation of the statute of limitations as construed by the District and Supreme Courts of the State of Idaho, whereby the period of limitation was substantially shortened, impairs the
147 obligation of this contract and is, therefore, repugnant to the clause of the Constitution of the United States protecting the obligation of contracts from impairment by state legislation.

Second. Whether the effect of the sustaining of said demurrer by the District and Supreme Courts of the State of Idaho, and thereby denying your petitioner a trial of this case upon the merits, was to deprive your petitioner of its property without due process of law, contrary to the 14th Amendment to the Constitution of the United States.

Third. Whether the effect of the sustaining of said demurrer by the District and Supreme Courts of the State of Idaho, thereby tolling the statutes of limitation while the rights and franchises of your petitioner were suspended and in abeyance, and in reality shortening the period of limitation, was to deprive your petitioner of its property without due process of law, contrary to the 14th Amendment to the Constitution of the United States.

And your petitioner alleged and contended, in opposition to said demurrer in said case, that the said statutes of limitation could not be tolled against the cause of action set up by your petitioner during the period while the rights and privileges accruing to it, your petitioner, under said declaration of trust, were suspended and in abeyance and your petitioner, upon its oral arguments and in its printed brief in said case, upon the hearing thereof in said Supreme Court of Idaho, read and cited, in extenso, the opinion of Mr. Justice Story in the case of Dartmouth College vs. Woodward, 4 Wheat. (U. S.) 691, in support of its said contention.

At the July term, 1913, of the Supreme Court of the State of Idaho, the complaint made by said appeal and its accom-
148 panying record came on to be heard and was argued in said Supreme Court and on the 8th day of September, A. D., 1913, the said Supreme Court rendered its final judgment thereon, affirming the judgment of the Court below, namely the District Court of the State of Idaho, in and for the County of Shoshone.

Your petitioner further shows that the said judgment was and is a final judgment in the highest court of the State of Idaho, in which a decision in said case could or can be had.

And your petitioner further shows that a decision could not be had or made in said case, without deciding the Federal questions hereinbefore enumerated and that a decision of said Federal Questions was absolutely necessary to the judgment rendered.

Wherefore your petitioner refers to the exemplified transcript of the record of the Supreme Court of Idaho in said case and prays that a writ of error to the said Supreme Court be allowed; that citation be granted and signed; that the bond herewith presented be approved, that the errors complained of may be reviewed in the Supreme Court of the United States and the judgment aforesaid of said Supreme Court of the State of Idaho be reversed.

[Seal Olympia Mining and Milling Company, Limited, Incorporated 1909, Wallace, Idaho.]

OLYMPIA MINING AND MILLING COMPANY, LIMITED,
By CLARENCE CUNNINGHAM, *President.*

CHAS. E. MILLER,
FEATHERSTONE & FOX,
Attorneys and of Counsel for Petitioner.

[Endorsed:] No. 2116. The Supreme Court of the State of Idaho. Olympia Mining & Milling Company, Limited, Plaintiff and Appellant, vs. Abner G. Kerns, Defendant and Respondent. Petition on Writ of Error. Filed this 27 day of Mch. 1914. I. W. Hart, Clerk. by C. E. Plummer, Deputy.

149 In the Supreme Court of the State of Idaho.

OLYMPIA MINING & MILLING COMPANY, LIMITED, a Corporation, Plaintiff in Error,
vs.
ABNER G. KERNS, Defendant in Error.

Bond on Writ of Error.

Know all men by these presents, That we, the Olympia Mining & Milling Company, Limited, a corporation, and the Ætna Accident & Liability Company of Hartford, Connecticut, as sureties are held and firmly bound unto Abner G. Kerns in the sum of One Thou-

sand Dollars ($1,000.00) to be paid to the said obligee, his heirs, executors, administrators and assigns; to the payment of which, well and truly to be made, we bind ourselves, our successors, representatives and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of March, A. D. 1914.

Whereas the above named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Idaho.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

OLYMPIA MINING & MILLING COMPANY, LIMITED,
By CHAS. E. MILLER, *Its Attorney in Fact.*
[SEAL.] CLARENCE CUNNINGHAM,
Its President.

150 THE ÆTNA ACCIDENT AND LIABILITY COMPANY,
[SEAL.] By HERMAN J. ROSSI,
Resident Vice President.

Attest:
THERRETT TOWLES,
Resident Assistant Secretary.

151 STATE OF IDAHO,
County of Shoshone, ss:

On this 25th day of March, A. D. 1914, before me, personally appeared Chas. E. Miller, the person who executed the foregoing bond as attorney in fact for said Olympia Mining & Milling Company, Limited, and acknowledged that he executed the same as his free act and deed and that he was fully authorized to do so.

[SEAL.] J. H. WIXOM,
Notary Public in and for said Shoshone County.

STATE OF IDAHO,
County of Shoshone, ss:

On this 25th day of March A. D., 1914, personally appeared before me, Herman J. Rossi, who, being duly sworn, deposes and says that he is the resident Vice-President of the said The Ætna Accident & Liability Company; that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed on behalf of said corporation by the authority of its board of directors; and that the said corporation is authorized under the laws of the State of Idaho to make, execute and deliver said instrument, and the said Herman J.

Rossi, acknowledged the said instrument to be the free act and deed of said corporation.

HERMAN J. ROSSI.

152 Subscribed and sworn to before me this 25th day of March, 1914.

[SEAL.] A. WYMAN,
A Notary Public in and for said Shoshone County.

I hereby approve the foregoing bond and sureties this 27th day of March A. D. 1914.

J. F. AILSHIE,
Chief Justice of the Supreme Court of the State of Idaho.

153 Ætna Accident and Liability Company, Hartford, Connecticut.

Certificate of Authority of Resident Vice-President.

Know all men by these presents, That Herman J. Rossi, has been and is hereby appointed Resident Vice-President of The Ætna Accident and Liability Company, of Hartford, Connecticut, at Wallace, Idaho, and as such Resident Vice-President has full power and authority to sign and execute, on behalf of The Ætna Accident and Liability Company, any and all bonds and undertakings, and all bonds and undertakings signed by him, when sealed and attested by a Resident Assistant Secretary, shall be as valid and binding upon the Company as if said bonds and undertakings had been signed by the President and duly sealed and attested.

This appointment is made under and by authority of the following By-Law adopted by the Board of Directors of The Ætna Accident and Liability Company at a meeting duly called and held on the 28th day of December, 1911.

Article 8. Resident Officers, Attorneys-in-Fact and Agents.

SECTION 1. The President, any Vice-President or the Secretary may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries, Attorneys-in-Fact and Agents to represent and act for and on behalf of the Company, and either the President, any Vice-President, the Secretary or the Board of Directors may at any time remove any such Resident Vice-President, Resident Assistant Secretary, Attorney-in-Fact or Agent and revoke the power and authority given him.

SECTION 2. Resident Vice-Presidents may, subject to the provisions and limits named in their certificate of authority, sign and execute on behalf of the Company any and all bonds and undertakings and other writings obligatory in the nature of a bond, and may bind the Company thereby as fully and to the
154 same extent as the President or any other Officer could bind it; such bonds and undertakings, however, to be attested in every instance by a duly appointed Resident Assistant Secretary.

In witness whereof, The Ætna Accident and Liability Company has caused these presents to be signed by its Vice President, and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, this 21 day of August, A. D. 1913.

THE ÆTNA ACCIDENT AND LIABILITY COMPANY,
By WALTER C. FAXON, *Vice-President.*

Attest:
[SEAL.] R. W. MYERS,
Assistant Secretary.

STATE OF CONNECTICUT,
County of Hartford, ss:

On this 21 day of August, A. D. 1913, before me personally came Walter C. Faxon, to me known, who, being by me duly sworn, did depose and say: That he resides in the City of Hartford, State of Connecticut; that he is the Vice President of The Ætna Accident and Liability Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporate and that he signed his name thereto by like order.

[SEAL.] JAMES F. McEVITT,
Notary Public.

My commission Expires Jan. 31, 1914.

155 Ætna Accident and Liability Company, Hartford, Connecticut.

Certificate of Authority of Resident Assistant Secretary.

Know all men by these presents, that Therrett Towles has been and is hereby appointed Resident Assistant Secretary of the Ætna Accident and Liability Company, of Hartford, Connecticut, at Wallace, Idaho, and as such Resident Assistant Secretary has power and authority to affix the seal of the Company to, and attest on behalf of the Company, any and all bonds and undertakings, and all bonds and undertakings sealed and attested by him, when signed by a duly appointed Resident Vice-President, shall be as valid and binding upon the Company as if said bonds and undertakings had been sealed and attested by the Secretary.

This appointment is made under and by authority of the following By-Law adopted by the Board of Directors of The Ætna Accident and Liability Company, at a meeting duly called and held on the 28th day of December, 1911.

Article 8. Resident officers, attorneys-in-fact and Agents.

SECTION 1. The President, any Vice-President or the Secretary may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries, Attorneys-in-Fact and Agents to represent

and act for and on behalf of the Company, and either the President, any Vice-President, the Secretary or the Board of Directors may at any time remove any such Resident Vice-President, Resident Assistant Secretary, Attorney-in-Fact or Agent and revoke the power and authority given him.

SECTION 3. Resident Assistant Secretaries may, subject to the provisions and limits named in their certificate of authority, affix the seal of the Company to and attest on behalf of the Company
156 any and all bonds and undertakings and other writings obligatory in the nature of a bond, and may bind the Company thereby as fully and to the same extent as the Secretary of any other Officer could bind it; such bonds and undertakings, however, to be signed and executed in every instance by a duly appointed Resident Vice-President.

In witness whereof, The Ætna Accident and Liability Company has caused these presents to be signed by its Secretary, and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, this 21st day of August, A. D. 1913.

THE ÆTNA ACCIDENT AND LIABILITY COMPANY,

(Signed) By J. S. ROWE.

Attest:

[SEAL.] R. W. MYERS,
Assistant Secretary.

STATE OF CONNECTICUT,
County of Hartford, ss:

On this 21st day of August, A. D. 1913, before me personally came J. S. Rowe, to me known, who, being by me duly sworn, did depose and say: that he resides in the City of Hartford, State of Connecticut; that he is the Secretary of The Ætna Accident and Liability Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

[SEAL.] JAMES F. McEVITT,
Notary Public.

My commission Expires Jan. 31, 1914.

Endorsed: Filed this 27 day of Mch. 1914. I. W. Hart, Clerk, by C. E. Plummer, Deputy.

157 The Supreme Court of the State of Idaho.

OLYMPIA MINING AND MILLING COMPANY, LIMITED, Plaintiff and Appellant,
vs.
ABNER G. KERNS, Defendant and Respondent.

Order Allowing Writ of Error.

The above entitled matter coming on to be heard upon the petition of the appellant therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Idaho, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented in the record in said matter.

It is ordered that a writ of error be, and is hereby, allowed to this Court from the Supreme Court of the United States, and that the bond presented by said petitioner be, and the same is, hereby approved.

Dated this 27th day of March, A. D., 1914.

(Signed) J. F. AILSHIE,
Chief Justice of the Supreme Court of the State of Idaho.

Endorsed: Filed this 27 day of Mch. 1914. I. W. Hart, Clerk, by C. E. Plummer, Deputy.

158 The Supreme Court of the State of Idaho.

OLYMPIA MINING & MILLING COMPANY, LIMITED, a Corporation, Plaintiff in Error,
vs.
ABNER G. KERNS, Defendant in Error.

Assignment of Errors.

Now comes the said plaintiff in error and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Idaho, in the above entitled matter there is manifest error in this, to-wit:

159 First. For that the court erred in holding that the provisions of Sections 4036, 4052, 4054 and 4060 of the Revised Codes of Idaho, as construed by the said court in rendering said judgment are not in conflict with and in violation of Article 1, Section 10, of the Constitution of the United States protecting the obligation of contracts from impairment by state legislation, for that the defendant in error, by and through the provisions of said Sections 4036, 4052, 4054 and 4060 of the Revised Codes of Idaho,

assumes and seeks to impair, nullify and destroy the rights and privileges of the plaintiff in error secured to it under and in virtue of the Declaration of Trust which said action was brought to enforce, by shortening the several periods of limitation and holding and adjudging that said statutes of limitation began to run and could be tolled against plaintiff in error between the date of the execution and delivery of said Declaration of Trust and the date of the due organizing and creation of the plaintiff in error as a corporation, in accordance with said Declaration of Trust, and that the rights, privileges and franchises guaranteed and secured to plaintiff in error, by virtue of said Declaration of Trust, were not suspended and in abeyance, during said period.

Second. For that the court erred in not holding and adjudging that the said Declaration of Trust constituted a contract between the defendant in error, as the trustee of an express trust and the plaintiff in error as a cestui que trust, and that the rights and privileges thereby accruing to, and conferred upon, the plaintiff in error, remained suspended and in abeyance until the plaintiff in error should be duly organized and created a corporation, as provided by said Declaration of Trust and that to the extent to which said several statutes shortened the period, or periods, of limitation as applied to these issues, the same were unconstitutional and void, as impairing the obligations of the said contract between said parties.

160 Third. For that the court erred in not holding and adjudging that the rights, privileges and franchises of the plaintiff in error were suspended and in abeyance during the period elapsing between the declaring of said trust and the organization and creation of the plaintiff in error a corporation.

Fourth. For that the court erred in not holding and adjudging that said several statutes of limitation were unconstitutional and void, if, and when applied to the period in which the property rights, privileges and franchises of the plaintiff in error and all other persons, similarly situated, were suspended and in abeyance.

Fifth. For that the court erred in sustaining said demurrer and affirming said judgment of dismissal and thereby denying to plaintiff in error a trial upon the merits and depriving it of its property without due process of law, contrary to the 14th Amendment to the Constitution of the United States.

Sixth. For that the court erred in not overruling said demurrer and reversing said judgment and in not holding and adjudging that the plaintiff in error was entitled to a trial of the said issues upon the merits, in accordance with the law of the land.

Seventh. For that the court erred in sustaining said demurrer and judgment thereby, in effect, tolling the said statutes of limitation while the rights, privileges and franchises of the plaintiff in error were suspended and in abeyance, thus shortening the period, of limitation and depriving the plaintiff *of* error of its property without due process of law, contrary to the 14th Amendment to the Constitution of the United States.

Eighth. For that the court erred in sustaining said demurrer.

161 Ninth. For that the court erred in affirming the judgment of dismissal made and rendered by said District Court.

Wherefore the said Olympia Mining & Milling Company, Limited, the plaintiff in error herein, prays that the judgment and decision aforesaid may be reversed, annulled, and altogether held for naught, and that it may be restored to all things which it has lost by the action and because of the judgment and decision.

Dated, March 27th, A. D., 1914.

——— ———,
——— ———,
Attorneys and Counsel for Plaintiff in Error.

Endorsed: Chas. E. Miller, Featherstone & Fox, Attorneys for Plaintiff in Error, Wallace, Idaho. Filed this 27 day of M'ch, 1914. I. W. Hart, Clerk, by C. E. Plummer, Deputy.

162 *Writ of Error.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Idaho, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the State of Idaho, before you, or some of you, being the highest court of law or equity of the said State, in which a decision *can* be had in the said suit between the Olympia Mining & Milling Company, Limited, a corporation, and Abner G. Kerns, wherein was drawn in question, the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of *the* statute of, or an authority exercised under, said State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or authority of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Olympia Mining & Milling Company, Limited, a corporation, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all

163 things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the

same at Washington on the 25th day of May, A. D. 1914, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness The Honorable Edward D. White, Chief Justice of the said Supreme Court, the 27th day of March, in the year of our Lord Nineteen hundred Fourteen.

[Seal United States District Court, Idaho. 1890.]

A. L. RICHARDSON,
Clerk of the District Court of the United States for the State of Idaho, Northern Division,
By LAWRENCE M. LARSON,
Deputy Clerk.

Allowed by—
J. F. AILSHIE,
Chief Justice of the Supreme Court of the State of Idaho.

[Endorsed:] No. 2116. In the Supreme Court of the United States. Olympia Mining & Milling Company, Limited, a Corporation, Plaintiff in Error, vs. Abner G. Kerns, Defendant in Error. Writ of error. Filed this 27 day of M'ch, 1914. I. W. Hart, Clerk, by C. E. Plummer, Deputy. Chas. E. Miller, Featherstone & Fox, Attorneys and Counsel for Plaintiff in Error. P. O. Address, Wallace, Idaho.

164 *Citation to Defendant in Error.*

UNITED STATES OF AMERICA, *ss:*

To Abner G. Kerns, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a Writ of Error filed in the Recorder's Office of the Supreme Court of the State of Idaho, wherein Olympia Mining & Milling Company, Limited, a corporation, is Plaintiff in Error, and you, the said Abner G. Kerns, are the Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error, as in said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James A. Ailshie, Chief Justice of the Supreme Court of the State of Idaho, this 27th day of March, in the year of our Lord One Thousand Nine Hundred Fourteen.

[Seal of Supreme Court, State of Idaho.]

J. F. AILSHIE,
Chief Justice of the Supreme Court of the State of Idaho.

165 *Return on Citation in Error.*

STATE OF IDAHO,
County of Shoshone, ss:

In the Supreme Court of the State of Idaho.

I, Thomas McCabe, Sheriff of the County of Shoshone, State of Idaho, hereby certify that I received the within and hereunto annexed Citation In Error, on the 28th day of March, A. D. 1914, and personally served the same upon Abner G. Kerns, Defendant in error, by delivering to and leaving with the said Abner G. Kerns, personally, in the County of Shoshone, State of Idaho, on the 30th day of March, A. D. 1914, a copy of said Citation In Error.
Dated March 31st, A. D. 1914.

THOMAS McCABE, *Sheriff,*
By JOHN R. ROGERS, *Deputy.*

[Endorsed:] No. 2116. In the Supreme Court of the State of Idaho. Olympia Mining & Milling Company, Limited, a corporation, Plaintiff in Error, vs. Abner G. Kerns, Defendant in Error. Citation in Error. Chas. E. Miller, Featherstone & Fox, Attorneys and Counsel for Plaintiff in Error, P. O. Address, Wallace, Idaho. Filed Apl. 4, 1914. I. W. Hart, Clerk.

166 In the Supreme Court of the State of Idaho.

OLYMPIA MINING & MILLING COMPANY, LIMITED, a Corporation,
Plaintiff in Error,
vs.
ABNER G. KERNS, Defendant in Error.

Præcipe for Transcript.

Hon. I. W. Hart, Clerk of said Court:

You will please prepare a transcript in obedience to the Writ of Error in the above entitled action this day lodged with you, which shall include the following files and papers:

1. The original transcript certified from the District Court to your Court in the above entitled action.
2. Motion to Dismiss Appeal.
3. Judgment on Motion.
4. Petition to Reinstate Appeal.
5. Judgment on Petition.
6. Judgment Affirming the Court below.
7. Opinion on such affirmance.
8. Remittitur to District Court.
9. Petition on Writ of Error.
10. Bond on Writ of Error.

11. Order Allowing Writ of Error.
12. Assignment of Errors.
13. Writ of Error.
14. Citation in Error with proof of service.
15. Your Certificate.

(Signed) CHAS. E. MILLER,
Attorney for Plaintiff in Error;
Address, Wallace, Idaho.

Endorsed: Chas. E. Miller, Featherstone & Fox, Attorneys and Counsel for Plaintiff in Error. Filed this 27 day of Mch. 1914, I. W. Hart, Clerk. By C. E. Plummer, Deputy.

167 In the Supreme Court of the State of Idaho.

OLYMPIA MINING & MILLING COMPANY, LTD., Plaintiff in Error,
vs.
ABNER G. KERNS, Defendant in Error.

Certificate of Clerk.

CLERK'S OFFICE,
Supreme Court, ss:

I, I. W. Hart, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the foregoing are full, true and correct copies of the Original Transcript certified from the District Court to this court; the Motion to Dismiss Appeal; the Judgment on Motion; the Petition to Reinstate Appeal; the Judgment on said Petition; the Judgment affirming the court below; the Opinion of this court on such affirmance; the Remittitur from this court to the District Court; the Bond on Writ of Error; the Order allowing Writ of Error, and Assignment of Errors, all in the above entitled case, as the same appear in the files and records of this court. Also the Original Petition on Writ of Error; Original Writ of Error and Original Citation in said case.

In witness whereof, I hereunto set my hand and the seal of the court, this 21st day of April, 1914.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,
Clerk Supreme Court.

168 OLYMPIA MINING & MILLING COMPANY, LTD., Plaintiff in Error,
vs.
ABNER G. KERNS, Defendant in Error.

Return to Writ.

UNITED STATES OF AMERICA,
Supreme Court of Idaho, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, in accordance with the direction of præcipe filed by Plaintiff in Error, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court, in the City of Boise, this April 21st, 1914.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,
Clerk of the Supreme Court
of the State of Idaho.

Endorsed on cover: File No. 24,233. Idaho Supreme Court. Term No. 495. Olympia Mining & Milling Company, Limited, plaintiff in error, vs. Abner G. Kerns. Filed May 22d, 1914. File No. 24,233.

JAN 23 1915
JAMES D. MAHER

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1914

OLYMPIA MINING AND MILLING COMPANY, Limited, a corporation,
Plaintiff in Error,
vs.
ABNER G. KERNS,
Defendant in Error.

No. 495

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS

CHAS. E. MILLER,
Counsel for Plaintiff in Error,
Wallace, Idaho.

FEATHERSTONE & FOX,
Associate Counsel,
Wallace, Idaho.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1914

OLYMPIA MINING AND MILLING COMPANY, Limited, a corporation,
Plaintiff in Error,

vs.

ABNER G. KERNS,
Defendant in Error.

No. 495.

BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS

STATEMENT OF FACTS.

The Statement of Facts tendered in the brief of the defendant in error is so inadequate and palpably unfair that we deem it necessary to re-state the case to give this Court a clear idea of what constitutes the issues here.

The defendant in error and Edward T. Elom were the owners of the mining claims involved in this action, in the proportion of three-eights and five-eights, respectively. Elom committed suicide early in the year of 1901 and his estate passed into the hands of the public administrator.

On May 28, 1901, the defendant in error and Clarence Cunningham entered into the following agreement in writing:

"This Agreement, made and entered into on the 28th day of May, 1901, by and between Clarence Cunningham, party of the first part, and A. G. Kearns, party of the second part, all of the City of Wallace, County of Shoshone, State of Idaho,

"WHEREAS, the estate of Edward F. Elom, deceased, is the owner of an undivided 5-8th of the "Olympia," "Seattle," "Portland," "Olympia Fraction," and "Alice" and an undivided 1-2 of the "Darling," "Pacific," "Rose," "Lincoln" and "Diamond Fraction" Lode Mining claims, situated in Placer Center and Lelande Mining Districts, in the County of Shoshone, State of Idaho, lying between the Mammoth and Sixteen to One mines and south of the Custer Mine; and the party of the second part is the owner of the other portions of the said mining claims except the Rose and Lincoln; and

"WHEREAS, the party of the second part as such co-owner has petitioned the probate court for an order for the sale of the interest of the estate of said deceased in said mining claim, and said petition is to be heard on the 3d day of June, 1901, and it is anticipated that an order for the sale of said property will be made; and

"WHEREAS, it is the desire of the parties hereto to purchase the interest of said estate in said properties if the same can be bought for a reasonable sum and upon reasonable terms; for the purpose of consolidating all of the interests therein and forming a mining corporation to prospect, develop and work said mining claims; and

"WHEREAS, the party of the first part is about to leave the State of Idaho, expecting to be absent for a period of two months, more or less, and the sale of said premises may occur during said period,

"It is therefore hereby mutually agreed that the party of the second part shall offer to purchase and purchase the interest of the estate of said decedent in said mining claims, if the same can be purchased for the appraised value of said premises, or any less sum; and that the party of the first part will assume

and be responsible for the bid and purchase of the party of the second part, and furnish the necessary money to make such purchase at the time when called for by the party of the second part.

"And in consideration of the premises and the services to be so rendered by the party of the second part it is further mutually agreed that said party of the second part shall be entitled to one-tenth of all of said mining claims, in which he at present has no ownership.

"And it is further mutually agreed that upon the formation of the corporation hereinbefore referred to, which corporation is to be formed as soon as practicable after making said purchase, the party of the second part shall have and be entitled to one-tenth of the stock of said corporation, which stock shall be fully paid up and non-assessable until after all of the other nine-tenth of the stock have paid ten cents per share to said corporation for the development of said mining claims.

"And as a further consideration the party of the second part hereby agrees to do and perform on each of said mining claims the assessment work required for the year 1901, free of expense to the party of the second part.

"And as a further stipulation the party of the second part agrees to convey to the party of the first part, or his assigns, all his rights, title and interest in said mining claims for the sum of Five Thousand dollars to be paid upon completion of the purchase of the interest of said estate in the premises or sooner.

"Witness our hands and seals this 28th day of May, 1901.

"CLARENCE CUNNINGHAM,
"A. G. KERNS."

This agreement was prepared by the defendant in error who was an attorney at law of the courts of Idaho.

(Transcript, paragraph III., pp. 2-3.)

Subsequently and pursuant to said agreement, the defendant procured an order of sale of the interest of the said Edward T. Elom, deceased, the same was sold to him for the sum of $2500.00 and the sale was confirmed on August 13, 1901.

(Transcript, paragraph IV., p. 3.)

Clarence Cunningham made the cash payment of $500.00 required on the Elom purchase and on August 15, 1901, he paid to the defendant in error, on account of the latter's interest, the sum of $1350.00.

(Transcript, p. 4.)

On August 17, 1901, the defendant in error executed and delivered a Declaration of Trust as to the mining claims in question acknowledging that he held the legal title thereto in trust for the use and benefit of a corporation thereafter to be formed and to be named the Olympia Mining Company.

(Transcript, p. 13.)

DECLARATION OF TRUST.

I, A. G. KERNS of the City of Wallace, County of Shoshone, State of Idaho, do hereby declare and acknowledge that I hold the legal title to the following interests in certain mining claims in trust for the use and benefit of a corporation to be hereafter formed and to be named the Olympia Mining Company, provided Clarence Cunningham, of the City of Wallace, in the County of Shoshone, State of Idaho, or the said corporation, shall comply with the provisions of an agreement in writing dated the 38th day of May, 1901, between the said Clarence Cunningham and the said A. G. Kearns.

The said mining premises being particularly described as follows, to-wit:

The "Olympia" lode mining claim.

The "Portland" lode mining claim.

The "Seattle" lode mining claim.

The "Alice" lode mining claim.

The "Olympia Fraction" lode mining claim.

The "Darling" lode mining claim.

The "Pacific" lode mining claim.

The "Diamond Fraction" lode mining claim.

One-half of the "Rose" lode mining claim.

One-half of the "Lincoln" lode mining claim.

All situated on the divide between Canyon Creek and the East Fork of Nine Mile Creek, in Placer Center and Leland Mining District, County of Shoshone, State of Idaho.

Dated this 17th day of August, 1901.

Witness my hand and seal.

(Seal) A. G. KERNS.

County of Shoshone, State of Idaho, ss.

On this 17th day of August, A. D. 1901, before me, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, personally appeared A. G. Kerns, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office

in Wallace, Idaho, the day and year in this certificate first above written.

(Seal) HORACE M. DAVENPORT,
Clerk of the District Court of the First Judicial District of the State of Idaho in and for Shoshone County.

By CHAS. A. ERVIN, Deputy.

Duly verified.

File—May 29, 1905.

(Transcript, p. 13.)

Immediately after the acquisition of the Elom interest the said Clarence Cunningham entered into possession of the said mining claims and caused a large number of persons to associate themselves together for the purpose of expending money in the development of the same. They expended $26,000.00 in development work on these claims, paid $500.00 on account of the purchase of the Elom interest and they paid the defendant in error the sum of $4100.00 on account of purchase money for his interest, all prior to March 1, 1903.

(Transcript, paragraph VI., pp. 3-4.)

And they paid the expenses of the application for a patent.

(Transcript, paragraph VII., p. 5.)

On March 20, 1903, Cunningham and his associates caused a mining corporation to be or-

ganized under the laws of the State of Washington and named it "Olympia Mining Company." The defendant acquiesced in the act of incorporation and subscribed for a portion of its capital stock, paying the sum of $50.00 thereon.

(Transcript, paragraph IX., p. 5.)

On August 18, 1904, the defendant in error, with intent to cheat and defraud, to cheat and defraud the plaintiff in error, sold to a stranger, an equal and undivided one-fourth interest in said mining claims.

(Transcript, paragraph XIII., p. 7.)

On May 20, 1905, the said Olympia Mining Company tendered the defendant in error the sum of $900.00 in gold coin and a certificate for 10,000 shares of the capital stock of said corporation, fully paid to 10 cents per share, which said several tenders the defendant in error refused and he then and there refused to execute a deed as requested. Thereupon the Olympia Mining Company on May 29, 1905, commenced its action against the defendant in error to enforce said trust.

(Transcript, paragraph XVI., p. 8.)

This action was diligently prosecuted in the District Court of the First Judicial District of Idaho and resulted in a decree in favor of the

Olympia Mining Company as prayed in its complaint. The defendant in error, thereupon, took said action to the Idaho Supreme Court by appeal, the same was submitted to said last named court at the October term 1906 thereof and the decree of the District Court was in all things affirmed.

(Transcript, paragraph XVII., p. 8.)

The opinion affirming this judgment is attached to the complaint as Exhibit B.

(Transcript, pp. 14-27.)

Later, on petition for rehearing, this judgment was set aside and a judgment was entered by the Supreme Court, reversing the decree of the Court below on the sole ground that the defendant in error was entitled to have a corporation formed under the laws of Idaho.

(Transcript, pp. 27-38, 13 Idaho, 514.)

A second appeal was taken in this case which resulted in the affirmance of the former appeal.

Olympia Mining Co. vs. Kerns, 15 Idaho, 371.

On April 5, 1909, Cunningham and his associate formed a new corporation, called the Olympia Mining & Milling Company Limited, under and by virtue of the corporation laws of the State of Idaho, with a capital stock of $1,000,000 divided into 1,000,000 shares of the par

value of $1.00 per share. This step was taken to comply with the decision in Olympia Mining Company vs. Kerns, 13 Idaho, 514. The defendant in error was invited to participate in the forming of this corporation and was elected one of the seven directors.

(Transcript, paragraph XX., pp. 10-11.)

During the same month the new corporation, which is the plaintiff in error here, tendered the defendant in error the sum of $1405.00 in gold coin and 100,000 shares of its capital stock, fully paid to 10 cents per share and demanded its deed as provided in the Declaration of Trust. These tenders were refused by the defendant in error, absolutely, and he declined to make the deed.

(Transcript, paragraph XXIV., pp. 11-12.)

In the absence of Cunningham from the State and in violation of the promise of the defendant in error to notify the former, the Public Administrator foreclosed the $2,000.00 mortgage on the Elom five-eighths. No other inference can be drawn from the facts in this case than that this was at the instigation of the defendant in error. At the sale, under these foreclosure proceedings J. G. Cunningham, one of the many assoicates of Clarence Cunningham, bid in this interest, for the common benefit of all, receiving the sheriff certificate of sale.

(Transcript, paragraphs X., XI., XII., p. 6.)

On August 18, 1904, the defendant in error reedeemed the Elom interest, sold to J. G. Cunningham, as a trustee, by paying to the Sheriff of Shoshone County the amount for which the property had been sold with interest and costs. (Transcript, paragraph XIII., p. 7.)

The defendant in error, made two conveyances affecting these mining claims, at different times, an undivided one-fourth interest to W. J. Hall and later the entire property to Jerome L. Day, but both of these grantees have since re-conveyed the same and the defendant in error now holds the entire legal title.

On August 23, 1909, the plaintiff in error began another action to enforce the trust, similar to the Idaho case, in the Superior Court of Washington at Spokane. The lower court declined to take jurisdiction on the ground of comity and rendered a judgment of dismissal. On appeal to the Washington Supreme Court, this decision was affirmed, not upon the ground suggested by the court below, but wholly for the reason that the subject of the litigation being real property situated in another state, the court could render no final judgment.

Olympia Mining & Milling Co. vs. Kerns, 64 Wash. 54.

On March 28, 1912, the present suit was commenced in the District Court of the First

Judicial District of the State of Idaho, in and for Shoshone County. The complaint in full will be found in the transcript on page 1-38. A general and special demurrer was interposed. (Transcript, pp. 38-39.) The demurrer was sustained and plaintiff in error electing to stand on its compalint, judgment of dismissal was entered and an appeal taken to the Idaho Supreme Court. On October 7, 1912, this appeal was dismissed for failure to file and serve the transcript within the time prescribed by the rules of the appellate court. At this juncture the present counsel came into the case.

(Transcript, pp. 44-45.)

The plaintiff in error filed its petition to reinstate its appeal on January 3, 1913. (Transcript, pp. 45-56.) Elaborate printed briefs were filed, which discussed not only the grounds of the motion, but the merits as well. On March 27, 1913, the Court rendered its judgment reinstating the appeal. (Transcript, p. 56.) Later the court affirmed the decision of the court below.

(Transcript, pp. 57-73.)

Olympia Mining & Milling Co., 24 Idaho 481.

This elaborate and, possibly, prolix statement, is made to suggest to this Court two facts:

1. That the plaintiff in error has been diligent and guilty of no laches within the rule laid

down by Mr. Justice Lamar, in *Boyd vs. Northern Pacific Railway Co.*, 224 U. S. 482.

2. That the defendant in error has constantly interposed every conceivable obstacle to the execution of his trust, and the record shows studied efforts on his part to defraud the beneficiaries.

Sec. 4046 of the Idaho Revised Codes, Vol. 2, page 47, is as follows:

PERSONS UNDER DISABILITIES.

If a person entitled to commence an action for the recovery of the possession thereof, or to make any entry or defense founded on the title to real property, or to rents or services out of the same, be at the time such title first descends or accrues, either:

1. Within the age of majority; or

2. Insane; or

3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for life; or

4. A married woman, and her husband be a necessary party with her in commencing such action or making such entry or defense.

The term during which such disability continues is not deemed any portion of the time in this title limited for the commencement of such

action may be commenced, or entry or defense made within the period of five years after such disability shall cease, or after the death of the person entitled who shall die under such disability; but such action shall not be commenced, or entry or defense made after that period.

Among the powers enumerate and given to private corporation as enacted by the Idaho Legislature (Session Laws of 1909, page 163), are the following:

"Every corporation, as such has power.

First. Of succession, by its corporate name, for the period limited, and when no period is limited, perpetually;

Second. To sue and sued in any court, as a natural person may.

Fourth. To purchase and hold such real and personal estate as the purposes of the corporation may require, not exceeding the amount limited by this title; and to sell, lease, assign, transfer, mortgage, or convey, any rights, privileges, franchises, real or personal property of the corporation, other than its franchises of being a corporation; and to purchase, own, vote, sell or hypothecate the stock and bonds of other corporations.

Eighth. To enter into any contracts or obligations essential necessary or proper to the tran-

saction of its ordinary affairs, or for the purposes of the corporation.

BRIEF AND ARGUMENT ON MOTION TO DISMISS OR AFFIRM.

The brief of the defendant in error, on this motion, goes simply to the point that, ordinarily, the Federal right relied upon must have been specifically raised in the court below in order that this Court may take jurisdiction. We have no quarrel with him in that contention and, it may be admitted that under a proper state of facts, such is the general rule. But, in the discussion, his counsel takes no notice of that class of cases, where, although no Federal question is specifically pleaded, or as such is not even alluded to, but the case could not be decided, or the judgment sustained, without deciding a Federal question, then this Court has jurisdiction.

This proposition has been so often decided in the affirmative by this Court that it would be superfluous to cite the numerous cases on that subject, and we will only refer to two leading cases.

Where, upon a writ of error to a state court, a Federal question is raised in the Supreme Court, and it is possible that its decision was necessarily involved in the judgment below, a motion to dismiss will not be sustained, although

it may not appear affirmatively on the face of the record that such question was raised below.

Eureka L. & Y. Canal Co. vs. Superior Court, 116 U. S. 410.
Kaukauna W. P. Co. vs. Green B. & M. C. Co., 145 U. S. 269.

At least two Federal questions are presented by this record under the Fourteenth Amendment, and it was impossible for the Idaho Supreme Court to decide the case without deciding these questions, both of which were adjudged adversely to the plaintiff in error.

Under the agreement between the defendant in error and Cunningham, after the latter had paid the former $1350.00 on account of his individual interest, and the $500.00 cash required on the purchase of the Elom interest, of which the defendant had taken the legal title, the defendant in error executed the Declaration of Trust, Exhibit A. Presumably Cunningham had complied with his agreement and the same became merged in the Declaration of Trust. The agreement was simply important to indicate what Cunningham was to do in the future. The Court below, and the counsel here have regarded the Declaration of Trust as conditional, that is that the things Cunningham was still to perform were conditions precedent. Such is not the law. The conditions referred to were to be performed in the future. They were to follow

the performance of the contract and might operate to defeat it upon the subsequent failure of Cunningham, or the plaintiff in error, to comply with the conditions. It was clearly a condition subsequent.

Both the agreement and the declaration of trust explicitly stated that these mining claims were to become the property, not of Cuninngham, nor of the defendant in error, but of a corporation to be formed in the future to be named the Olympia Mining Company. No time was set within which such corporation was to be formed. That such a corporation should be formed was mutually agreed and it was not made the duty of Cunningham, more than the defendant in error to act in the matter. Such a corporation as the Idaho Supreme Court required, was formed on April 5, 1909, after four or five years of stubborn litigation necessitated by the defendant in error. The case was decided adversely to the plaintiff in error on the grounds of laches and the operation of the statutes of limitations.

It has been the law of the land, since the decision of the Dartmouth College Case, that when a corporation to be formed in the future, is endowed with franchises and real property, these grants remain in abeyance and attach when the incorporators bring the corporation into exist-

ence. It was recited in the agreement and announced in the declaration of trust, that these lands were to be acquired and held in trust for a corporation to be thereafter formed and to be named the Olympia Mining Company, and that the defendant in error was to have one-tenth of the capital stock of the intended corporation.

The Dartmouth College Case, 4 Wheat. 518, was heard on a writ of error from this Court to the Superior Court of Judicature, the highest court in the State of New Hampshire.

There were two main points considered by the court, the one was the original charter to Dartmouth College, a contract and protected by the Constitution of the United States; and the other, was it impaired by the acts under which the defendant held?

Mr. Webster argued that the charter was purely a private executed contract. It was contended that because the grants of franchises and lands were made before there was a corporate existence of the college, the charter could not be construed a contract.

Upon this branch of the case Mr. Justice Story held as follows:

"If this had been a new charter granted to an existing corporation, there could not have been a doubt that the grant would have been an executed contract with the corporation, as

much so as if it had been to any private person. But it is supposed, that as this corporation was not then in existence, but was created and its franchises bestowed *uno flatu*, the charter cannot be construed a contract, because there was no person in *rerum natura*, with whom it might be made. Is this, however, a just and legal view of the subject? If the corporation had no existence so as to become a contracting party, neither had it for the purpose of receiving a grant of the franchises. The truth is that there may be a priority of operation of things in the same grant; and the law distinguishes and gives such priority wherever it is necessary to effectuate the objects of the grant. * * * When on the other hand, the corporation is to be brought into existence by some future act of the corporators, the franchises remain in obeyance, until such acts are done, and when the corporation is brought into life the franchises instantaneously attach to it."

If the doctrine of this case is correct, and this Court has never gainsaid it, from the date of the trust, August 17, 1901, until the corporation, such as the Idaho Supreme Court required, was formed, April 5, 1909, the plaintiff in error was under total disability. Although it was the equitable owner of these mining claims, it could not assert title nor demand possession, it could

neither sue, nor be sued, nor assert itself in any way, although, when actually incorporated, it would have the same property rights as a natural person. See corporation laws of Idaho, *supra*.

In the statement of facts we have included the Idaho statute relating to persons under disabilities, against whom the statutes of limitations do not run, *supra*.

It is submitted that the words therein used are not words of limitation by that the evident intention of the Legislature was to include all persons under actual recognized legal disabilities.

From the foregoing we deduce these propositions, under the Fourteenth Amendment:

1. That in denying the plaintiff in error, while under the legal disability, the same rights the state law gives minors, insane persons, criminals and married women, the plaintiff in error is deprived of its property without due process of law and is denied the equal protection of the laws. Or, as Mr. Justice Field, eloquently put it in *Barbier vs. Connelly*, 113, U. S. 27:

"The Fourteenth Amendment in declaring that no state 'shall deprive any person of life, liberty or property without due process of law nor deny to any person the equal protection of the laws," undoubtedly "meant, not only that

there should be no arbitrary spoilation of property, but that equal protection and security should be given to all alike under like circumstances in the enjoyment of their personal and civil rights, that all persons should be entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their person and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others, under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice no difference or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

2. That under the construction of the Idaho Supreme Court in tolling the statutes of limitations against the plaintiff in error, while under legal disability (minority we might say), these statutes in their operation deprive it of its property wihtout due process of law and deny to it the equal protection of the laws.

Both of these propositions were decided adversely to the plaintiff in error by the Idaho Supreme Court and it could not possibly have ren-

dered a judgment for either party without deciding them.

Where the defendant contended in the state court that the operation of a state irrigation statute deprived him of property without due process of law, contrary to the Federal Constitution, and the Supreme Court of the State decided against such contention, a Federal question was presented.

Tregea vs. Modesto Irr. Dist., 164 U. S. 179.

If a statute is so construed as to deprive one of his property without due process of law, it violates the constitutional provision and presents a Federal question.

Castillo vs. McConnico, 168 U. S. 674.

Where there is an abuse of law, amounting to confiscation of property or a deprivation of personal rights, the Federal courts will interfere.

Norwood vs. Baker, 172 U. S. 269.

A refusal to consider a Federal question which is controlling in a case is equivalent to a decision against the Federal right involved therein, and gives the Supreme Court jurisdiction to review.

Des Moines Nav. & R. Co. vs. Iowa H. Co., 123 U. S. 552.

The objection to a tax that it is taking property without due process of law and denies to the

taxpayers the equal protection of the laws raises a question under the Constitution of the United States; and where the question was necessarily involved in the final decision of the case, the writ of error cannot be dismissed.

Bell's Gap. R. Co. vs. Pennsylvania, 134 U. S. 232.

THE COURT WILL NOT GRANT THE MOTION IF CONSIDERATION OF THE MERITS IS REQUIRED.

In *Hecker vs. Fowler,* 1 Black 95, it was held that want of jurisdiction and irregularity of the writ are the only grounds of dismissal. Where a judgment appears to have been rendered which the party is entitled to have revised in the Supreme Court, and it is also seen that it comes here for such revision, upon proper process, duly issued, all other questions must await final hearing. To say that there is no error in this judgment, and affirm it for that reason, would be to decide the whole legal merits of the case and this we cannot do on a motion to dismiss or quash the writ. Followed in

Sparrow vs. Strong, 3 Wall. 97.
Minor vs. Tillotson, 1 How. 288.

When the question of jurisdiction is so involved with the other questions decided in the case that the Supreme Court cannot eliminate it without the examination of a voluminous record

and passing on the whole merits of the case, it will reserve the question of jurisdiction until the case is heard on the final agreement on the merits.

Semple vs. Hagar, 4 Wall. 431.

Where the record suggests many points which cannot be considered upon a motion to dismiss, the court will refuse the motion, but will allow it to be again brought to the notice of the court when the case shall be argued upon its merits.

Day vs. Washburn, 23 How 309.
Hecker vs. Fowler, 1 Black 95.
Semple vs. Hagar, 4 Wall 431.
Lynch vs. De Bernal, 131 U. S. 94.

On motion merely to dismiss, the merits of the case cannot be considered.

Bohanau vs. Nebraska, 118 U. S. 231.
Hill vs. Chicago & E. R. Co., 129 U. S. 170.
Chicago L. I. Co. vs. Needles, 113 U. S. 574.

BRIEF ON THE MERITS IN THE COURT BELOW.

The present counsel did not come into this case, as already stated, until after the dismissal of the appeal, for failure to file the transcript. To inform this Court as to its position on the hearing in the Idaho Supreme Court, the plaintiff in error takes the liberty of, here, reproducing its brief in that court verbatim, in its discussion of the merits. It was as follows:

ARGUMENT, POINTS AND AUTHORITIES.

PROPOSITION 1.

WHERE A CORPORATION IS TO BE BROUGHT INTO EXISTENCE BY SOME FUTURE ACT OF THE INCORPORATORS THE FRANCHISES REMAIN IN ABEYANCE AND ATTACH WHEN SUCH ACTS ARE DONE.

The original agreement between Kerns and Cunningham is therein recited to have been made for the express purpose of consolidating all of the interests in the properties therein described and "FORMING A MINING CORPORATION to prospect, develop and work said mining claims." And in his Declaration of Trust, the respondent thereby, declares and acknowledges that he holds the legal title to the mining claims described therein "In Trust for the use and benefit of a corporation TO BE HEREAFTER FORMED AND TO BE NAMED THE OLYMPIA MINING COMPANY."

Under this agreement, in lieu of his three-eighths original personal interest in these mining claims, the respondent was to have $5,000.00 in money and one-tenth of the capital stock of the proposed corporation. And it will be particularly observed that no security was exacted from

Cunningham, no provision of forfeiture was made, no time was set for incorporation and not a single condition, in either the contract, or declaration of trust, was stated to be of an essence.

The plaintiff corporation was duly organized and created on April 5, 1909, and according to the pleadings, was such a corporation as was and had been contemplated by the parties. From the time of the declaration of trust until this corporation came into being, its rights and franchises remained in abeyance, but the moment it came into existence, and not until then, its property rights and franchises, instantaneously, attached to it.

No principal of law is more elementary than this, and it is most clearly enunciated by Story J., in the Dartmouth College Case, from which we take this excerpt:

"When, on the other hand, the corporation is to be brought into existence by some future acts of the corporators, the franchises remain in abeyance, until such acts are done, and when the corporation is brought into life the franchises instantaneously attach to it. There may be, in intendment of law, a priority of time, even in an instant, for this purpose. And if the corporation have existence before the grant of its other franchises attaches, what more difficulty is there

in deeming the grant of these franchises a contract with it, than if granted by another instrument at a subsequent period. It behooves those also, who hold that a grant to a corporation, not then in existence, is incapable of being deemed a contract on that account, to consider, whether they do not at the same time establish that the grant itself is a nullity for precisely the same reason. Yet such a doctrine would strike us all as pregnant with absurdity, since it would prove that an act of incorporation could never confer any authorities, or rights, or property, on the corporation it created. It may be admitted that two parties are necessary to form a perfect contract, but it is denied that it is necessary that the assent of both parties must be at the same time. If the Legislature were voluntarily to grant land in fee to the first child of A to be thereafter born; as soon as such child should be born the estate would vest in it. Would it be contended that such grant, when it took effect, was revocable, and not an executed contract, upon the acceptance of the estate? The same question might be asked in a case of a gratuitous grant by the king or the legislature to A, for life, and afterwards to the heirs of B, who is then living. Take the case of a bank, incorporated for a limited period upon the express condition that it shall pay out of its corporate funds a certain sum as the consideration for the

charter, and after the corporation is organized payment duly made of the sum out of the corporate funds; will it be contended that there is not a subsisting contract between the government and the corporation by the matters thus arising *ex post facto, that* the charter shall not be revoked during the stipulated period? Suppose an act declaring that all persons who should thereafter pay into the public treasury a stipulated sum, should be tenants in common of certain lands belonging to the state in certain proportions; if a person afterwards born pays the stipulated sum into the treasury, is it less a contract with him than it would be with a person *in esse* at the time the act passed? We must admit that there may be future springing contracts in respect to persons not now *in esse*, or we shall involve ourselves in inextricable difficulties. And if there may be in respect to natural persons, why not also in respect to artificial persons, created by law for the very purpose of being clothed with corporate powers? I am unable to distinguish between the case of a grant of land or a franchise to an existing corporation, and a like grant to a corporation brought into life for the very purpose of receiving the grant. As soon as it is *in esse*, and the franchises and property become vested and executed in it, the grant is just as much an

executed contract as if its prior existence had been established for a century."

Dartmouth College vs. Woodward, 4 Wheat 691.

This case is cited to the point mentioned in the following cases:

Williams vs. State, 23 Tex. 287.
People vs. Wren, 4 Scam. 280.
Vincennes Univ. vs. Indiana, 14 How. 275.
Huff vs. Winona, 11 Minn. 192.

There is nothing to prevent the owner of property from conveying it to a person in trust to convey to a corporation when organized, and, when the corporation is organized, it may compel the trustee to convey it in accordance with terms of the trust deed.

Clark and Marshall, Private Corps., Sec. 111 (b).

Where property was conveyed by individuals to a trustee, in trust to hold the same for the benefit of the individuals until the organization of a certain corporation, and then to convey the same to the corporation, it was held that a parol agreement between the individuals and the trustee that they and the corporation, when formed would pay the trustee a certain amount for his services, was not binding upon the corporation, and that failure to make such payment

was no grounds for the trustee's refusal to convey to the corporation.

Hecla, etc., Min. Co. vs. O'Neil, 19 N. Y. Supp. 592.

If land is purchased by persons representing a voluntary association for the common benefit of the persons composing the association, and the purchase money is paid, and possession of the land given, the vendor becomes a trustee for the purchasers, and, as they are mere agents of the association, the moment the association is corporated it has a right to a conveyance from the vendor, and may enforce such right in equity.

African M. E. Church vs. Conover, 27 N. J. Ep. 157.

The validity of a conveyance to a corporation after it has been created is not affected by the fact that it has not performed conditions subsequent, or by the fact that it is not yet ready to transact the business for which it was created.

Clark and Marshall, Private Corps, Sec. 111 (a).

Thus, in a Pennsylvania case, where letters patent were issued to a corporation by the governor under a statute, and a conveyance was afterwards made to it, it was held that the conveyance was valid and vested the title in the corporation, an acceptance of the charter being

presumed, although the corporation had not yet been organized by the election of officers.

Rathbone vs. Tioga N. Co., 2 Watts and S. 74.

Where a contract by the promoters of a corporation with the owner of land under which the latter agrees to sell the land to the corporation when organized is adopted by the corporation it may sue for specific performance.

Scadden F. G. Min. Co. vs. Scadden, 121 Col. 33.

PROPOSITION II.

THE CAUSE OF ACTION DOES NOT ACCRUE AND THE STATUTE OF LIMITATIONS BEGIN TO RUN UNTIL THERE IS SOME PERSON IN BEING AND NOT UNDER LEGAL DISABILITY WHO CAN SUE OR BE SUED.

"Until a corporation is organized as authorized by its charter," said the Illinois Supreme Court, "there is not a corporation, nor does it possess franchises or faculties for it or others to exercise, until it acquires a complete existence. By its birth, so to speak, it for the first time acquires its faculties to transact its business and perform its functions."

Gent vs. M. & M. Ins. Co., 107 Ill. 652.
Wood on Limitations, Sec. 117.

Under the agreement and trust, Cunningham obligated himself to pay to the respondent the sum of $5,000.00 for the original three-eighths interest owned by the latter in the mining claims in question and the further sum of $2,500.00 for the remainder owned by the Elom estate, after the purchase thereof. It was plainly understood that Cunningham was acting for himself and other persons associated with him, not however, in their personal capacity, but for a corporation to be formed in the future. The title was not to be taken by the individuals, but by the corporation, as the respondent acknowledged in his Declaration of Trust. This Court held that the corporation contemplated by the parties was an Idaho corporation. Such a corporation was not formed until the 5th day of April, 1909. Under the same agreement and trust the respondent was to have as a further consideration for the transfer of his three-eighths interest, 100,000 shares of the capital stock of the proposed corporation. Palpably, there was none to take the legal title, nor could the stock be issued, until the proposed corporation had come into existence. Nor was there an entity capable of suing or being sued.

The respondent was the trustee, both voluntarily, and by virtue of having received a large consideration in money. He was the custodian and guardian of the interests of the corporation,

yet to be, and he could have enforced payment by Cunningham if in default, and equally well by mandamus he could have required the organization and incorporation and the issue to him of the capital stock in the amount agreed upon.

It appears from the complaint, paragraph XX. (transcript, pp. 21-2), that when the plaintiff corporation was organized, April 5, 1909, the respondent was previously notified of the intention to incorporate and he was requested to participate in such organization to become a member of the Board of Directors to take part in the adoption of by-laws and generally to participate in the affairs of the proposed corporation—all of which he utterly failed and refused to do.

Now that an action has been brought to enforce the trust, the respondent pleads the several statutes of limitations, seeking thereby to appropriate to himself the property which he has solemnly declared to belong to others, thus not only violating his obligation to the *res*, but also trampling under foot his fiduciary obligations to his co-beneficiaries.

As this action was begun on March 28, 1912, less than three years after the plaintiff was incorporated under the laws of Idaho, none of the several statutes of limitations are applicable.

The statute of limitations never begins to run unless there is some one in existence capable of suing and being sued.

Hopper vs. Steel, 18 Ala. 828.

Citing:

Murray vs. East India Company, 5 Barnes & Adophus, 204.
Angell on Limitations, 55.
Pothier Fraides Obligationes, 645.

The cause of action does not accrue and the statute of limitations begin to run until there is some person in being and not under legal disability who can sue or be sued.

Everett vs. Smith, 62 N. H. 386.
Davies vs. Garr, 6 N. Y. 124.
Dunning vs. Bank, 61 N. Y. 497.
Sanford vs. Sanford, 62 N. Y. 555.
McDonald vs. Walton, 1 Mo. 726.
Polk vs. Allen, 19 Mo. 467.
Ruff vs. Bull (Md.), 7 H. & J. 14.
Com. vs. McGowan, 4 Bibb 62.

We quote the following from *Ruff vs. Bull, supra*, also reported in 16 Am. Dec. 291:

"The principle of law is indisputable that when the statute of limitations once begin to run nothing will stop or impede its operation. It never does attach unless there be some person in being competent to sue. * * *

It is also pertinent, here, to bear in mind that the Declaration of Trust contains a proviso that Cunningham, "OR THE SAID CORPORATION SHALL COMPLY WITH THE PROVISIONS" of the agreement of May 28, 1901.

Obviously, the corporation could not take Mr. Cunningham's place and comply with the provisions of that agreement, until it had been formed and created in the manner required by the laws of the State of Idaho.

PROPOSITION III.

IN AN ACTION BY THE CESTUI QUE TRUST AGAINST THE TRUSTEE TO ENFORCE AN EXPRESS CONTINUING TRUST, THE DEFENSE OF THE STATUTE OF LIMITATIONS, OR OF LACHES, IS NEVER AVAILABLE TO THE DEFENDANT.

The two written instruments, set out in full in the complaint, are both between the same parties, relate to the same subject matter and are complements of each other. Read together they clearly create an express trust and are both drawn by the respondent, who is licensed to practice law. The second instrument he designates as a "Declaration of Trust," and he therein declares that he holds the legal title to the several mining claims in trust for the use and benefit of a corporation to be thereafter formed. These instruments contain every element necessary to create an express trust in that they point out directly and explicitly the PROPERTY, PERSONS, AND PURPOSE OF THE TRUST.

As is said in Sec. 82 of Vol. I of Berry on Trusts:

"There is no particular formality required or

necessary in the creation of a trust. Any agreement or contract in writing made by a person, having the power of disposal over property whereby such person agrees or directs that a particular parcel of property or a certain fund shall be held or dealt with in a particular manner for the benefit of another, in a court of equity raises a trust in favor of such other person against the person making such agreement or any other person claiming under him voluntarily or with notice."

The case comes to this Court on a demurrer to the complaint. The demurrer admits the truth of every fact which is well pleaded and is material to recovery. Under the allegations contained in the complaint the due incorporation of the plaintiff in compliance with the trust agreement is admitted and that every covenant on the part of Mr. Cunningham, or its performance, fully tendered.

A trustee of an express trust cannot profit by his office, nor can he purchase the trust property, nor will he be permitted to plead the statutes of limitation in any action brought by the beneficiary to enforce the trust. The rule for which we are contending has been adopted in this state and is tersely stated in an opinion written by Mr. Justice Sullivan, in the case of *Ames vs. Howes*, 13 Idaho, page 756.

"EXPRESS TRUSTS ARE THOSE WHICH ARE CREATED BY THE DIRECT

AND POSITIVE ACTS OF THE PARTIES BY WRITING, DEED OR WILL. 3 WORDS AND PHRASES, P. 2611, AND AUTHORITIES THERE CITED: PERRY ON TRUSTS, SEC. 2425. IT IS STATED IN WOOD ON LIMITATIONS, SEC. 200, AS FOLLOWS:

"'IT IS WELL SETTLED THAT A SUBSISTING, RECOGNIZED, AND ACKNOWEDGED TRUST AS BETWEEN THE TRUSTEE AND CESTUI QUE TRUST, IS NOT WITHIN THE OPERATION OF THE STATUTE OF LIMITATION.'"

Probably the latest text book treatment of the subject of the application of limitations and laches to trusts is found in 39 Cyc. 600 (7 b), where the following statement upon the subject is made:

"As a general rule, however, the general statutes of limitations do not apply to cases of express and continuing trusts, as between the trustee and the *cestui que* trust; and in cases of continuing trusts that are strictly such, and recognized and enforced in courts of equity only so long as the relation of trustee and *cestui que* trusts continues to exist, ordinarily, no mere lapse of time will bar the *cestui que* trust or his rights in the subject of the trust as against the trustee."

In support of this proposition, the editor cites twenty-three cases from seventeen different states, three cases from the Federal courts, and two cases from the English courts, all of comparatively recent date.

The following excerpts from text books and cases all clearly sustain the rule announced by Mr. Justice Sullivan in the Idaho case of *Ames vs. Howes*, already referred to:

As between trustee and *cestui que* trust in the case of an express trust the statute of limitations has no application, and no length of time is a bar. * * * The relations and privity between the trustee and *cestui que* trust are such that the possession of the one is the possession of the other, and there can be no adverse claim or possession during the continuance of the relation. Lord Justice Knight Bruce said that where one entered into possesison as trustee, he could not be permitted to set up a possession or title in himself adverse to the *cestui que* trust. It is the duty of the trustee, if he intends to claim the estate, to resign his trust and deliver over the possession which he received as trustee. He will then be in a position to maintain his claim, for no claim should be made through a breach of trust. And no trustee, while occupying a place of trust and confidence, should be allowed to set up an adverse title.

2 Perry on Trusts (6th Ed), Sec. 863.

"One proposition thoroughly settled is that express or direct and continuing trusts are not within the statutes of limitation."

Jones vs. Henderson, 149 Ind. 461.

In announcing the above proposition, Hackney, J., goes on to say:

"In 13 *Am. & Eng. Ency of Law, supra*, it is announced, as a well established rule, that as between a trustee of an express trust and his *cestui que* trust no statute of limitations, nor any bar by analogy to the statute can be relied on, citing many authorities."

"In *Beach Mod. Eq., supra*, it is said:

'Length of time is no bar to a trust clearly established, and express trusts are not within the statute of limitations, because the possession of the trustee is presumed to be the possession of the *cestui que* trust.' "

"It has already been shown that a beneficiary may always claim and reach the trust property through all its changes of form while in the hands of the trustee, and that he may also follow it into the possession and apparent ownership of third persons, until it has been transferred to a bona fide purchaser for valuable consideration and without notice; and that a court of equity will furnish him with all the incidental

remedies necessary to enforce his claim and to render it effective. In addition to this claim of the beneficiary upon the trust estate as long as it exists the trustee incurs a personal liability for a breach of trust by way of compensation or indemnification, which the beneficiary may enforce at his election, and which becomes his only remedy whenever the trust property has been lost or put beyond his reach by the trustee's wrongful act. The trustee's personal liability to make compensation for the loss occasioned by a breach of trust is a simple contract equitable debt. It may be enforced by a suit in equity against the trustee himself, or against his estate, after his death, and the STATUTE OF LIMITATIONS WILL NOT BE ADMITTED AS A DEFENSE unless the statutory language is express and mandatory upon the court."

Pomeroy's Equity Jurisprudence, Sec. 1080.

The statutes of limitations do not bar an action by the *cestui que* trust against the trustee of an express trust. The reason assigned for the rule is that as between the two, the possession of the trustee is deemed to be the possession of the beneficiary.

Lewis vs. Hawkins, 23 Wall. 119.
Symour vs. Freer, 8 Wall. (U. S.) 218.
White vs. Costigan, 138 Cal. 564.
Reynolds vs. Summer, 126 Ill. 58.
Haskell vs. Hervey, 74 Me. 192.
Condit vs. Maxwell, 142 Mo. 266.

Dyer vs. Waters, 46 N. J. E. 484.
Merritt vs. Merritt, 169 N. Y. 634.
Owens vs. Williams, 130 N. C. 165.
Kimball vs. Ives, 17 Vt. 430.
Stewart vs. Conrad, 100 Wis. 539.

The plea of laches cannot be invoked in cases brought to enforce a trust against a trustee of an express trust.

Hensel vs. Keegan, 8 Tex. C. A. 586.
Jackson vs. Lynch, 129 Ill. 72.
Citizens Nat'l Bk. vs. Judy, 146 Ind., 322.
McKechine vs. McKechine, 39 N. Y. 402.

(a) A TRUSTEE CANNOT PROFIT BY HIS OFFICE.

"If a person standing in a fiduciary relation make use of the position to purchase an interest in the trust property with his own funds, as a reversion, a junior mortgage, or other interest, from a third person * * * he cannot retain the same for his own benefit, but he must hold it upon a resulting trust for his beneficiary. The prohibition of the purchase of trust property by the trustee does not depend upon any question of fraud, but it is made absolute to avoid the possibility of fraud. The temptation of self interest is too powerful and insinuating to be trusted. A trustee must not put himself in a position where his private profit will oppose the interests of the estate. If a trustee buys an oustanding claim against the trust property, the transaction will be treated as a payment only, and he will be allowed only what he gave.

* * * * A trustee may not buy for himself an outstanding title to an estate.

1 *Perry on Trusts* (6th Ed), Sec. 129.

Citing, as to last proposition:

Brundy vs. Mayfield, 15 Mont. 291.
Allen vs. Arkinburgh, 37 N. Y. S. 1032.
Virginia C. Co. vs. Kelly, 93 Va. 332.
Turner vs. Lawyer, 150 U. S. 578.
Parker vs. Brast, 45 W. Va. 339.
39 *Cyc* (5), page 366.

"If, among the assets of the trust estate, there are leases, the trustee cannot renew them in his own name; and if he renews them in his own name he must hold them by a constructive trust for the same persons beneficially interested in the old leases."

1 *Perry on Trusts* (6th Ed.), Sec. 196.

"It is thus seen that the rule against purchasing by trustees, of the *cestui que* trusts, amounts almost to prohibition; for if a trustee purchases the property, and sells at a profit, he must account for it as a trustee."

1 *Perry on Trusts* (6th Ed.), Sec. 197.

"Trustees hold a position of trust and confidence. The legal title of the trust property is in them, and generally its whole management and control is in their hands. * * * They cannot use the trust property, nor their relation to it, for their own personal advantage. All the power and influence which the possession of

the trust fund gives must be used for the advantage and profit of the beneficial owners, and not for the personal gain and emolument of the trustee. No other rule would be safe; nor would it be possible for courts to apply any other rule as between trustee and *cestui que* trust."

1 *Perry on Trusts* (6th Ed.), Sec. 427.

(b) TRUSTEES CANNOT PURCHASE THE TRUST PROPERTY.

"A trustee can use the property only for the purposes contemplated in the trust, and must conform to the provisions of the trust in their true spirit, intent and meaning, and not merely in their letter. * * * It follows from their general duty that trustees cannot set up the adverse title of a stranger against their *cestuis que* trustent, and much less buy up and hold such adverse title for their own benefit."

Pomeroy's Equity Jurisprudence, Sec. 1062.

If a trustee conveys property to himself, even if done through a third person, any one or more of the *cestuis* may avoid the deed.

Morse vs. Hill, 136 Mass. 60.

The law looks only to the facts of the relation and purchase. The trustee must not deal with the property for his own benefit.

King vs. Remington, 36 Minn. 25.
Harrison vs. Manson, 95 Va. 593.
Ludington vs. Patton, 111 Wis. 208.

SUMMARY AND CONCLUSION.

The complaint in this case amply states a cause of action. The instruments constituting the trust are set out in full. It appears that the beneficiates have expended more than $30,000 in and about the trust property and that every act agreed to be done on behalf of the plaintiff has been performed, or its performance tendered. It also appears that the respondent has not only been unfriendly towards those with whom he holds fiduciary relations, but, also, that he has been guilty over and over of breaches of his trust and latterly interposed every obstacle within his reach to the successful carrying out of the intentions of the parties.

The complaint is somewhat inartificially drawn and is not in such form as the present counsel would prefer it should be. For instance, it is alleged in two different instances that the respondent had repudiated his trust. The word is thus used, however, as a conclusion and the facts stated, following the use of the word repudiated and do not constitute a repudiation at all, but, instead, a breach of his trust by the respondent.

Bouvier's Law Dictionary, 577, defines the word "Repudiate" thus:

"To express in a sufficient manner a determination not to accept a right, when it is offered."

That is, if when a trust is granted and then tendered to a trustee, the trustee refuses to accept it, or to act as such trustee, we would have an instance of the repudiation of a trust by a trustee.

In case of *Daley vs Peoples', etc., Association*, 178 Mass. 13, Holmes, C. J., now of the U. S. Supreme Court, draws the distinction between repudiation and rescission and the same is applicable here.

"A mere refusal to pay money when due, especially a refusal based upon the terms of the contract and in good faith, although mistakenly believed to be justified by it, is not a repudiation of the contract and does not warrant a recission.

THE ONLY REMEDY IS A SUIT UPON THE CONTRACT, not a suit for the consideration. * * * Conduct going no further than the defendant's might not justify even a refusal of further performance on the other side (*Mersey Steel & Iron Co. vs. Naylof*, 9 App. Cos. 434), a right which must not be confounded with recission, and which in some cases is more easily made out."

The prayer for relief is also meager, as an accounting should have been asked for, as well as, perhaps, other specific relief, but, under the last clause in which general relief is asked,

the court will have no difficulty in doing equity between the parties. In fact, also, much of the complaint could have been omitted as superfluous and immaterial, but no motion to strike surplusage was interposed.

If the matters we have suggested are objections, they cannot be reached by a general demurrer and the complaint is good, if it stated any cause of action at all.

The respondent has, apparently, regarded this action as simply one for the specific performance of the contract between him and Mr. Cunningham, a view which, seemingly, obtained the endorsement of the court below. Of course, with no provision for forfeiture, rights of a beneficiary not yet in being created, no steps for a recission of the contract taken, no attempt ever made to place the parties in *statu quo*, and an express trust unequivocally created, this position of the respondent is manifestly erroneous.

It is respectfully submitted that the judgment should be reversed and the court below directed to overrule the demurrer and to proceed with the cause in the manner provided by law.

CONCLUSION.

As this case went to the Idaho Supreme Court on complaint and demurrer and laches and limitation are pleas of privilege and matters of

defense, there was no occasion to anticipate them in the original complaint. Of course, the complaint might have been amended, but this the former attorneys neglected. It was entirely their province, not that of the party, and the oversight or negligence of the attorneys ought not to be imputed to the client. Perhaps, the Federal questions might have been raised on petition for rehearing, but an inspection of the opinion of the court below will show that this would have been futile and useless, things the law does not require.

But the Federal questions appeared plainly and equivocally in the record. The complaint alleges distinctly that from the date of the voluntary trust, coupled with an interest, August 17, 1901, until its incorporation, April 5, 1909, the plaintiff in error was laboring under legal disability, equivalent to minority, as applied to natural persons. This defense to the statute of limitations and laches, the Idaho Supreme Court refused to decide in favor of the plaintiff in error, or more properly, refused to decide at all, and the equal rights of the laws and due process of law were thus clearly denied to the plaintiff in error.

This case has been before the Idaho Supreme Court four times. The first decision, Exhibit B, after a full hearing on the merits, in the Dis-

trict Court, was decided in favor of the plaintiff in error and was undoubtedly right. On rehearing, this judgment was reversed on the sole ground that defendant in error was entitled to have an Idaho corporation, all other questions being decided in favor of the plaintiff in error. The case in the Washington courts decided nothing but the question of jurisdiction, which they denied. When this appeal was discussed in the Idaho Supreme Court for failure to file the transcript in time, the petition for reinstatement was filed long after the term had expired, at which such petition could be entertained. Necessarily, the petition was addressed to the discretion of the court. On the hearing elaborate printed briefs were filed which included a full discussion of the merits Certainly, in suspending and nullifying its own rules, the court must have examined the entire record and found merit in the contentions of the plaintiff in error and warranted the belief that the final decision would be in its favor. Thus it may be said that the Idaho Supreme Court has decided this case twice in favor of each party and that in that court, at least, the honors have been even. This is a very important case and, it is believed, an interesting one, presenting some features outside of the ordinary. We respectfully submit that it should be fully discussed and considered

on the merits and not dismissed on what we consider to be a purely technical ground.

The Idaho courts have treated this as purely a controversy between Cunningham and the defendant in error, although the record shows that the former had many persons assoicated with him and that they expended large sums of money. Some of the members of this Court formerly practiced law in mining districts and they know, and it is a matter of common knowledge, that millionaires, or men of large means, only, invest in sure, producing mines. Only those of small means, artisans, widows and the lowly, put their slender savings into mere prospects. In this (Coeur d'Alene) district, are hundreds of incorporated mining companies operating prospects because of the lure of hidden wealth, the money for the search of which comes almost solely from people of moderate means. The record shows that the people composing the stockholders of plaintiff in error have expended more than $30,000.00 upon this prospect. The defendant in error had originally a three-eighths interest in these claims. He has received $4100.00 in money from these lowly people, widows and orphans; his application for patent paid for (Transcript, paragraph VII., p. 5); $26,000.00 in development work was performed on the property and now he claims the

entire interest in these mining claims. Nor should it be overlooked that the defendant in error exhibited a pair of very dirty hands, in contemplation of equity, from the very start and he has never washed them since. In his deal with Cunningham he sold his three-eighths interest for $5000.00 and one-tenth of the capital stock of the intended corporation, paid to 10 cents per share, making a consideration of $15,-000.00. Under the agreement, he secured, by what means only Providence knows, poor old Ed. Elom's interest for $2500.00, which was five-eighths of the whole.

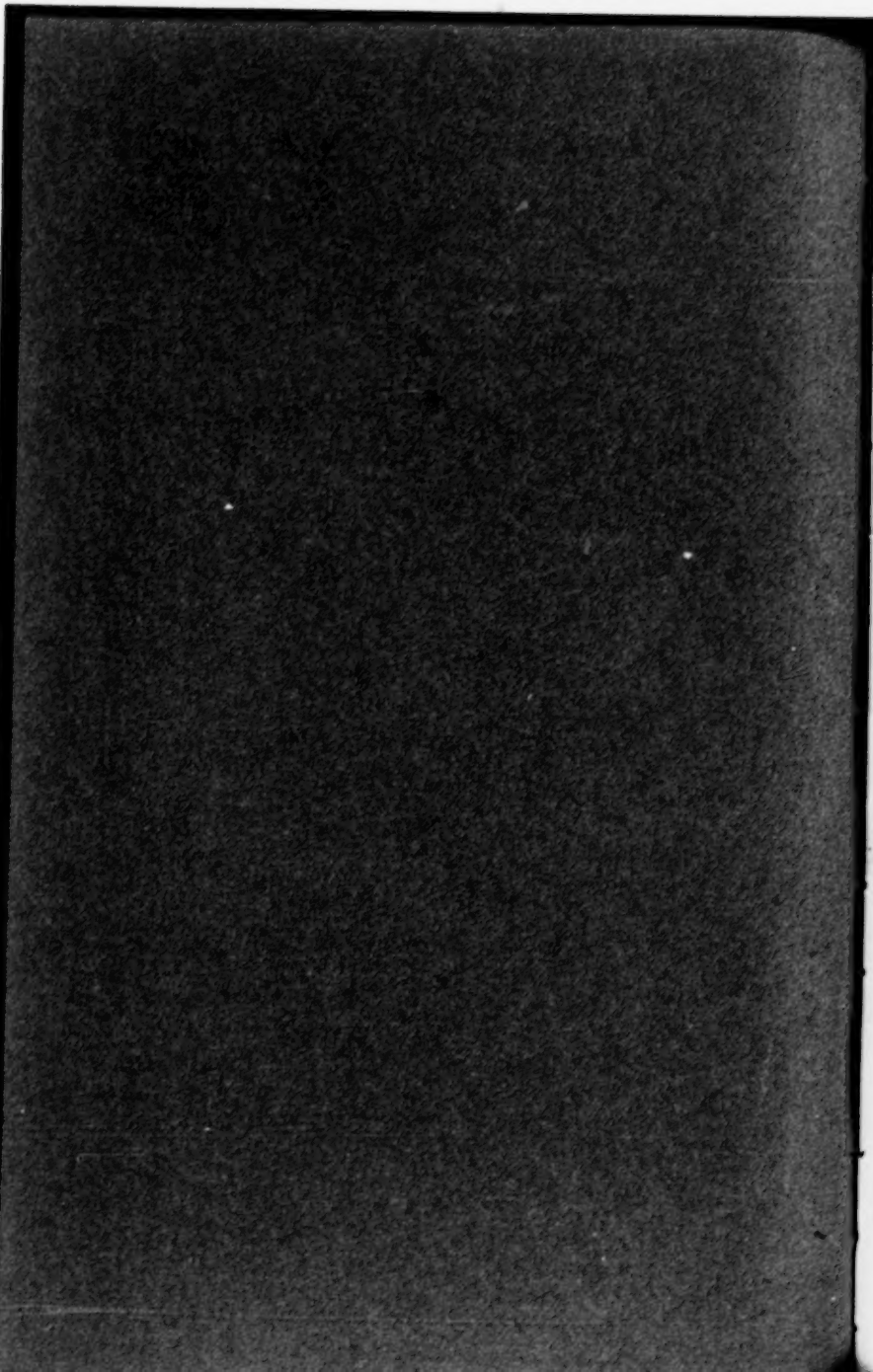
This Court is our last resort. Without relief here these people lose their entire investment and interest and possible future profits. Your Honors are sitting as Chancellors. This is a court of conscience, and, somehow, we have a sublime faith that this Court will find the path leading to justice, however imperfectly we may have aided in the search. Surely the devious ways of a treacherous trustee cannot be sustained under any phase of law. It is a case such as the one in which an old-fashioned judge, having intimated what his decision would be, and been told by counsel that there was no law for it, exclaimed: "Well, if there is no law for, it is time we made some."

We submit that the motion should be denied and the cause heard on the merits.

CHAS. E. MILLER,
Counsel for Plaintiff in Error.

Featherston & Fox,
Associate Counsel.

[redacted]



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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1914.

NO. 495.

OLYMPIA MINING AND MILLING COMPANY, LIMITED, a Corporation,
Plaintiff in Error,
vs.
ABNER G. KERNS,
Defendant in Error,

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

MOTION, NOTICE OF MOTION, AND BRIEF OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM.

JAMES H. FORNEY,
Attorney for Defendant in Error.

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MOTION, NOTICE OF MOTION, AND BRIEF OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM.

Now comes the defendant in error and moves the Court to dismiss the writ of error herein, for the following reasons:

1. That this Court has no jurisdiction of the cause of action, because:

(a). There was not drawn in question before the Supreme Court of the State of Idaho the validity of a treaty, or statute of, or any authority exercised under, the United States; and no decision was rendered by said Court for or against any such question;

(b). That there was not drawn in question

before the Supreme Court of Idaho the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and no decision was rendered by said Court in favor or against their validity;

(c). That there was not drawn in question before the Supreme Court of Idaho any right, title, privilege, or immunity claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and no decision was rendered by said Court for or against such question.

2. That there is no Federal question involved in the case.

3. That if the writ of error shall not be dismissed, that the judgment of the Supreme Court of Idaho be affirmed, on the ground that although, in the opinion of this Court, the record may show that this Court has jurisdicition, it is manifest that the said writ of error was taken for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument, and for damages in accordance with the rules of this Court.

4. To transfer this cause for hearing to the summary docket, if this court should refuse to dismiss or affirm, because the case is of such a character as not to justify extended argument.

JAMES H. FORNEY,
Attorney for the Defendant in Error
for the Purpose of This Motion.

NOTICE.

To the Olympia Mining & Milling Company, Limited, a Corporation, and to Mr. Charles E. Miller, Its Attorney of Record, and to Featherstone & Fox, Its Counsel of Record:

You will please take notice that on the ..... 25th ..... day of ..... January ....., A. D. 1915, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the Court thereon.

Annexed hereto is a copy of our brief and argument in support of said motion.

This motion will be made on the printed record now on file herein.

JAMES H. FORNEY,
Attorney for the Defendant in Error
for the Purpose of This Motion.

SUPREME COURT OF THE
UNITED STATES.

OCTOBER TERM, 1914.

NO. 495.

OLYMPIA MINING & MILLING COMPANY, LIMITED, a Corporation,
Plaintiff in Error,

vs.

ABNER G. KERNS,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF
THE STATE OF IDAHO.

BRIEF OF THE DEFENDANT IN ERROR ON MOTION TO DISMISS OR AFFIRM.

STATEMENT OF FACTS.

On March 26, 1912, Clarence Cunningham caused the complaint in this action to be filed in the District Court of the First Judicial District of Idaho, in Shoshone County, in the name of the Plaintiff in Error, alleged to have been incorporated April 5, 1909, under the laws of Idaho, and by said action sought to have the Defendant in Error, Kerns, decreed to be the trustee, agent and attorney for the said corporation at all times from May 28, 1901, by reason of a contract of that date between the said Kerns and Cunningham, and a conditional declaration of trust executed by the defendant on August 17, 1901.

The Defendant in Error demurred to the complaint on the following grounds:

1. That the Court has no jurisdiction of the subject matter of the action.

2. That the complaint does not state facts sufficient to constitute a cause of action.

3. That the complaint is uncertain in not showing that Clarence Cunningham kept or performed his part of the agreement of May 28, 1901, and in not showing any valid excuse for his failure to keep his part of the said contract.

4. That the cause of action is barred by the provisions of Section 4036 of the Revised Codes of Idaho.

5. That the cause of action is barred by the provisions of Section 4052 of the Revised Codes of Idaho.

6. That the cause of action is barred by the provisions of Section 4054 of the Revised Codes of Idaho.

7. That the cause of action is barred by the

provisions of Section 4060 of the Revised Codes of Idaho.

This demurrer was heard and submitted and on April 27, 1912, was sustained; and the plaintiff electing not to amend, its default was entered and judgment of dismissal entered June 8, 1912.

In considering and passing on the demurrer the lower Court rightfully took judicial notice of its records and proceedings in other cases brought by the same parties against the same defendant and involving the same subject matter, and from such consideration and examination determined that the appellant corporation had not shown reasonable diligence or fairness and that it was guilty of laches, and that it would be inequitable to permit the appellant to maintain the action as against the demurrer.

This suit was originally started on May 29, 1905, by Clarence Cunningham causing a complaint to be filed in the lower Court in the name of Olympia Mining Company, a Washington corporation, against the defendant Kerns for the same cause of action, and the final decisions rendered in that case on appeal to the Supreme Court of Idaho are reported in 13 Idaho Reports, 514; and 15 Idaho Reports, 371, the final decision being dated October 14, 1908.

On May 28, 1909, Clarence Cunningham caused another action to be commenced in the lower Court by filing a complaint in the name of the Olympia Mining & Milling Company, Limited, the same plaintiff as the plaintiff in error, against the defendant Kerns, and involving the same subject matter. The defendant appeared in that action by demurrer on the same grounds substantially as the demurrer in this cause, and on June 7, 1909, after hearing and argument, the demurrer was sustained. On June 29, 1909, the plaintiff amended its complaint, alleging substantially the same matters and things as are set up in this ac-

tion. The defendant demurred to the amended complaint and noticed the same for hearing, upon which the plaintiff took a voluntary dismissal of the action, and on July 13, 1909, a judgment of dismissal was entered. No appeal was taken from this judgment.

In the month of August, 1909, Clarence Cunningham caused another suit to be commenced in the Superior Court of Spokane, State of Washington, in the name of the said Olympia Mining & Milling Company, Limited, the plaintiff in error herein, against the defendant Kerns, on the same subject matter and cause of action, and procured personal service on the defendant Kerns while temporarily within the jurisdiction of that Court. The defendant appeared in the action, and in November, 1909, the case was tried on its merits and judgment of dismissal was rendered. The plaintiff appealed to the Supreme Court of Washington, and on August 11, 1911, that Court affirmed the lower Court, the decision being reported in 117 Pac. Rep., 260.

In affirming the judgment the Supreme Court of Washington said:

> "But, whether it be held to be local or transitory, and whatever may have been the original right of the parties under their contract, intervening circumstances have so altered their relations to the subject matter of the controversy, that a Court can no longer make a decree by reference to the contract alone, but must go beyond it and inquire into equities that can not be held to be within the contemplation of the parties at the time the contract was made, all of which may be dependent upon the application of some statute or rule of law local to the State of Idaho. Such circumstances rob the case, otherwise transitory, of such character, and impel

> Courts to send litigants to that forum where a final and an effective judgment may be rendered."

Upon the trial of the above case in Spokane it was proved that a similar action had been commenced by the plaintiff against the defendant on May 28, 1909, and dismissed on July 13, 1909, by the District Court of Idaho. The trial judge in rendering his opinion said:

> "I am therefore of the opinion that whether or not this Court should entertain jurisdiction in this case is not a matter of right vested in plaintiff, but is to be decided by the Court upon the principles of comity and resting in the discretion of the Court. In a part of the cases cited the jurisdiction was retained, and in a part it was denied, and a reading of those cases will illustrate what reasons for declining to entertain jurisdiction are held valid and what not. In the case at bar, aside from reasons for refusing to take jurisdiction which have been held valid in some of the cases cited, there is a most cogent reason for such action, which is based upon considerations of public policy. If a trial court must or even will take jurisdiction in this case, then the right is established in a litigant after he has selected his forum and engaged his adversary. If it develops that the trial court is of the opinion that the law is against the plaintiff's contention, and if the plaintiff is then able to withdraw from the controversy without prejudice, he may go about this whole land seeking a tribunal presided over by a judge holding a different view of the law, and if he can serve the defendant, the case can again be litigated before an individual judge who has been subjected by the plaintiff to a preliminary try-out as to his

proficiency. In this case, if the defendant's demurrer had been heard by me, there would have been no hindrance to plaintiff dismissing this action upon the intimation of my views and again bringing the same suit in any other county of the state, and so on ad libitum, until by elimination plaintiff had, if possible, found a trial judge deemed by it competent to pass upon the merits of its litigation.

"The plaintiff owes its existence to the laws of Idaho, yet refuses to abide the adjudication of the courts of that state, and this after it had appealed to such courts and the court in the proper exercise of the jurisdiction invoked had ruled that the plaintiff had no right of action. Not only is the exercise of jurisdiction in this case a matter of discretion, but to retain the jurisdiction in the face of this record would be scandalous and subsersive of the very fundamental thought of the creation of courts. We shall leave these Idaho citizens to adjudicate their rights at their own home, and according to the law of the place where the contract was made, was to have been performed, and where the property involved is situate."

The present action raising the same subject matter followed the final decision of the Supreme Court of Washington, and the complaint alleges the making of the agreement between the said Clarence Cunningham and the defendant Kerns on May 28, 1901, and the acts performed by the defendant Kerns under that contract, and that on August 17, 1901, the defendant Kerns executed a declaration of trust in favor of Cunningham. Then follows an allegation of the organization of the Olympia Mining Company under the laws of the state of Washington, and that there was not sufficient money in the treasury of the company to

pay a mortgage on the property or keep or perform Cunningham's part of the contract, and a claim that Cunningham had prior to his departure for Alaska made an arrangement with J. C. Cunningham of Spokane, Washington, Francis Jenkins of Moscow, Idaho, and F. Cushing Moore, that in case payment should be insisted upon, that they would advance the money for the payment of the mortgage, and notified the defendant of this arrangement and directed him to call on said parties for the money to make the payment, and that defendant promised he would do so.

Then follows allegations of the commencement of suit against defendant Kerns by Anna Connor, Administrator, for the foreclosure of the mortgage, and the entry of judgment of foreclosure and sale, and the sale of the property thereunder to J. G. Cunningham on August 22, 1903, and the redemption of the property from the sheriff's sale by the defendant Kerns on August 22, 1904, and the allegation that Clarence Cunningham first learned that the defendant Kerns had repudiated his trust and claimed to hold said mining claims as his own and adversely to said parties.

Then follows allegations reciting the commencement by Clarence Cunningham of an action against the defendant Kerns by the Olympia Mining Company, the Washington corporation, and the ultimate conclusion of that suit in October, 1908, by the judgment of the Supreme Court of Idaho.

Then follow other allegations of the formation of the Olympia Mining & Milling Company, Limited, the plaintiff in error in this case, and that the property has not changed in condition or value since the year 1903, and consists of mining claims of uncertain and speculative value.

The complaint does not allege that the mining claims have been patented; or that the annual assessment work has been performed on the unpat-

ented claims; nor that the taxes have been paid on the patented claims, nor that all of the mining claims still exist as valid locations; nor is there any allegation that Clarence Cunningham kept or performed his part of the contract of May 28, 1901, by paying the mortgage of $2,000.00 due August 13, 1902, and the balance due the respondent Kerns, and the complaint shows that by reason of this neglect a foreclosure suit was brought against the defendant Kerns, and that the sheriff's sale made thereunder was about to result in the alienation of the title to the property to a stranger to the contract.

The complaint shows that the conditional declaration of trust executed by the defendant Kerns was not to take effect until Cunningham or the corporation contemplated by the agreement kept and performed Cunningham's part of the agreement of May 28, 1901.

The demurrer of the defendant to this complaint was submitted to the lower Court on April 27, 1912, and sustained, and the plaintiff refusing to amend, its default was entered by a judgment of dismissal rendered June 8, 1912.

The appeal of the Plaintiff in Error to the Supreme Court o fIdaho was from this judgment.

The Supreme Court of Idaho, in its opinion on the appeal, which is a part of the record on appeal herein, made a full and complete review of the facts and law applicable to the case and affirmed the judgment of the lower Court without considering or having raised any Federal question involved in the case, which is reported in the 24 Idaho 481; 135 Pac. Rep. 255.

BRIEF AND ARGUMENT ON MOTION TO DISMISS, OR AFFIRM.

It is a well settled principle of law laid down

by this Court that it is essential to the jurisdiction of the Supreme Court to review a decision of a state court that a federal question should be actually raised in the latter court, and no jurisdiction exists where it was not raised until after final judgment, and in the petition for the writ of error, or in a petition for rehearing in the highest state court.

1.

a. "This court has decided many times that it is too late to raise the federal question for the first time in a petition for rehearing in the court of last resort of a state after that court has pronounced its final decision."

McCorquodale v. Texas, 211 U. S. 432, 53 L. 269.

Mutual Life Ins. Co. v. McGrew, 188 U. S. 291, 47 L. 480.

Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159.

Forbes v. State Counsel of Virginia, 216 U. S. 396, 54 L. 534.

Pim v. St. Louis, etc., 165 U. S. 273.

2.

The proper time to raise a federal question is in the trial court and before its judgment is made final, if that be required by the state procedure, and in accordance with which the appellate courts of the state will not revise the judgment of the trial court upon questions not therein raised.

Mutual Life Ins. Co. v. McGrew, 188 U. S.

291, 308 and authorities there cited, 47 L. 480.

Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159.

3.

The Supreme Court of the United States does not obtain jurisdiction to review the judgment of the state court on the ground that such judgment in effect impairs the obligation of a contract.

New Orleans Water Works Co. v. State of Louisiana, 185 U. S. 336, 46 L. 936, 943.

4.

The provisions of the federal constitution against impairment of the obligation of contracts has sole reference to legislation subsequent to the contract and has no reference to judicial decisions which may be claimed to have impaired such obligation.

Lehigh Water Co. v. Easton, 122 U. S. 388, 792, 30 L. 1059.

Central Land Co. v. Laidley, 159 U. S. 103, 40 L. 91.

New Orleans Water Works v. Louisiana, 185 U. S. 336.

"It is essential to the jurisdiction of the Supreme Court to review a decision of a state court that a federal question should have been actually raised in the latter court, and no jurisdiction exists where it was not raised

until after final judgment, and in the petition for the writ of error, or in a petition for a rehearing in the highest state court."

11 Cyc, 935, and cases cited.

"It should affirmatively appear from the record that a question NECESSARY to the determination of the cause was RAISED in the state court, and that the point giving jurisdiction to the Supreme Court was also DECIDED in the state court. The right should be set up in the state court in the pleadings. Especially is this last statement true if it is required by state practice, in accordance with which the highest court will not reverse or revise the judgment of the court below on questions not therein raised.

"It should affirmatively appear from the record that a question necessary to the determination of the cause was raised in the state court, and that the point giving jurisdiction to the Supreme Court was also decided in the state court. In the absence of such a showing the Supreme Court will not assume jurisdiction."

11 Cyc, 937.

"The question should be raised by the pleadings."

11 Cyc, 937, and cases cited in note 6.

Sayward v. Denney, 158 U. S. 180; 15 S. Ct. 777; 39 L. Ed. 941.

Chouteau v. Gibson, 11 U. S. 200, 28 L. Ed. 400.

Cincinnati Commercial Bank v. Buckingham, 5 How. U. S. 317, 12 L. Ed. 169.

"The right should be set up in the trial court or the Supreme Court can not on a writ of error review a decision as one against a right under the Constitution of the United States."

11 Cyc, 936, and cases cited in note 96.

"The question must be raised in the trial court whenever it is required by state practice in accordance with which the highest court of a state will not revise the judgment of the court below on questions not therein raised."

Loveland Appellate Jurisdiction Federal Courts, Sec. 320, page 679.

Hulbert v. Chicago, 202 U. S. 270, 50 L. Ed. 1026.

Chesapeake & O. R. Co. v. McDonald, 214 U. S. 191, 53 L. Ed. 963.

Erie Railroad Co. v. Purdy, 185 U. S. 148; 46 L. Ed. 847.

Brown v. Massachuestts, 144 U. S. 573; 36 L. Ed. 546.

Jacoby v. State of Alabama, 187 U. S. 133; 47 L. Ed. 106.

"If the denial by a state court of a right under a statute of the United States, is relied on as justifying our interposition, before it can be held that the state court thus disposed of a Federal question, the record must show, either by the words used or by clear and necessary intendment therefrom, that the right was specifically claimed; or a definite issue as to the possession of the right must be distinctly deducible from the record, without an adverse decision of which the judgment could not have been rendered.

"Moreover, even though a Federal question may have been raised and decided, yet if a question, not Federal, is also raised, and the decision of that question is sufficient to support the judgment, this court will not review the judgment.

"In our opinion no Federal right was specifically set up or claimed in this case at the proper time or in the proper way; nor was any such right in issue and necessarily determined; but the judgment rested on non-Federal grounds entirely sufficient to support it.

"The record discloses no Federal question asserted in terms save in the application to the supreme court for a rehearing, when the suggestion came too late."

Capital National Bank etc. v. First Nat. Bank, 172 U. S. 425; 43 L. Ed. 502.

It is the practice in the State of Idaho that the Supreme Court will not revise the judgment of the

trial court on questions not raised therein.

> "The appellate court will not pass upon and determine questions unless the record shows that such questions were passed upon and determined by the trial court, unless it be questions of jurisdiction."

Medbury v. Maloney, 12 Idaho Rep. 634, 88 Pac. 81.

Big Lost River Irr. Co. v. Davidson, 21 Idaho, 160.

Marysville Mercantile Co. v. Home Fire Ins. Co. 121 Pac. Rep. 1026 (Idaho).

Steve v. Bonners Ferry Lumber Co., 13 Idaho 392; 92 Pac. Rep. 363.

The assignments of error in this cause are wholly based upon and directed to the claim that the lower court erred in construing the provisions of the statutes of limitation of the State of Idaho, Sections 4036, 4052, 4054 and 4060, as operative against the appellant.

Section 4036 reads:

> Sec. 4036. No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appears that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the property in question within five years before the commencement of the action; and

this section includes possessory rights to lands and mining claims.

Section 4052 reads:

Action on written contract.

Sec. 4053. Within five years:

An action upon any contract, obligation, or liability founded upon an instrument in writing.

Section 4054 reads:

Statutory liabilities, trespass, trover, replevin and fraud.

Sec. 4054. Within three years:

1. An action upon a liability created by statute, other than a penalty or forfeiture;

2. An action for trespass upon real property;

3. An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property;

4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

Section 4060 reads:

Actions for other relief.

Sec. 4060. An action for relief not hereinbefore provided for, must be commenced

within four years after the cause of action shall have accrued.

The decision of the lower court was not based entirely upon the construction placed on these sections, but was founded upon the actual merits of the case.

> "It is the settled law of this court that to give it jurisdiction of a writ of error to a state court it must appear affirmatively not only that a Federal question was presented to that court for decision, but also that the decision of the question was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution; or that the judgment as rendered could not have been given without such decision."

Snell v. City of Chicago, 152 U. S. 191, 38 L. Ed. 408.

Montgomery's Manual of Federal Procedure, Secs. 336, 337.

In conclusion we will say that there was no Federal question raised or passed upon by the State trial or appellate court, and therefore this court has no jurisdiction in the case.

Wherefore, it is respectfully asked that the decision of the Supreme Court of the State of Idaho be affirmed.

JAMES H. FORNEY,
Attorney for Defendant in Error.

Even if the judgment of dismissal of the complaint was the result of sustaining a demurrer thereto, an express statement in the demurrer that it was based on the statute of limitation affords an opportunity for the plaintiff to assert that a Federal right would be impaired by applying the statute.

Writ of error to review 24 Idaho, 481, dismissed.

THE facts, which involve the jurisdiction of this court on writ of error under § 237, Judicial Code, to review judgment of the state court sustaining demurrer to and denying complaint, are stated in the opinion.

Mr. James H. Forney for defendant in error, in support of the motion.

Mr. Charles E. Miller for plaintiff in error, in opposition to the motion:

In denying the plaintiff in error, while under legal disability, the same rights the state law gives to minors, insane persons, criminals and married women, the plaintiff in error is deprived of its property without due process of law and is denied the equal protection of the laws. *Barbier* v. *Connelly*, 113 U. S. 27.

Under the construction of the Idaho Supreme Court in tolling the statutes of limitations against the plaintiff in error, while under legal disability (minority we might say), these statutes in their operation deprive it of its property without due process of law and deny to it the equal protection of the laws. *Tregea* v. *Modesto Irr. Dist.*, 164 U. S. 179.

If a statute is so construed as to deprive one of his property without due process of law, it violates the constitutional provision and presents a Federal question. *Castillo* v. *McConnico*, 168 U. S. 674.

Where there is an abuse of law, amounting to confiscation of property or a deprivation of personal rights, the

Federal courts will interfere. *Norwood* v. *Baker*, 172 U. S. 269.

A refusal to consider a Federal question which is controlling in a case is equivalent to a decision against the Federal right involved therein, and gives the Supreme Court jurisdiction to review. *Des Moines Nav. Co.* v. *Iowa Co.*, 123 U. S. 552.

The objection to a tax that it is taking property without due process of law and denies to the taxpayers the equal protection of the laws raises a question under the Constitution of the United States; and where the question was necessarily involved in the final decision of the case, the writ of error cannot be dismissed. *Bell's Gap R. R.* v. *Pennsylvania*, 134 U. S. 232.

The court will not grant the motion if consideration of the merits is required. *Hecker* v. *Fowler*, 1 Black, 95.

To say that there is no error in this judgment, and affirm it for that reason, would be to decide the whole legal merits of the case and this cannot be done on a motion to dismiss. See also *Sparrow* v. *Strong*, 3 Wall. 97; *Minor* v. *Tillotson*, 1 How. 288.

When the question of jurisdiction is so involved with the other questions decided in the case that the Supreme Court cannot eliminate it without the examination of a voluminous record and passing on the whole merits of the case, it will reserve the question of jurisdiction until the case is heard on the final agreement on the merits. *Semple* v. *Hagar*, 4 Wall. 431.

Where the record suggests many points which cannot be considered upon a motion to dismiss, the court will refuse the motion, but will allow it to be again brought to the notice of the court when the case shall be argued upon its merits. *Day* v. *Washburn*, 23 How. 309; *Hecker* v. *Fowler*, 1 Black, 95; *Semple* v. *Hagar*, 4 Wall. 431; *Lynch* v. *De Bernal*, 131 U. S. 94.

On motion merely to dismiss, the merits of the case

cannot be considered. *Bohanau* v. *Nebraska*, 118 U. S. 231; *Hill* v. *Chicago & Erie R. R.*, 129 U. S. 170; *Chicago Co.* v. *Needles*, 113 U. S. 574.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Concerned now only with a motion to dismiss, we limit our statement to that which is essential to decide such issue. In 1912 the Olympia Mining & Milling Company, Limited, the plaintiff in error, brought this suit to enforce a trust agreement between Kerns, the defendant in error, and one Cunningham by which it was alleged Kerns had obliged himself in 1901 to transfer to Cunningham certain property then owned or to be acquired by him for a designated consideration, Cunningham to put the title to the property when transferred in the name of a corporation to be by him organized of which Kerns was to have a stated proportion of the stock. The bill was generally demurred to and state statutes creating terms of limitation of three, four and five years were expressly set out in the demurrer as barring all right to the relief sought. In reviewing the action of the trial court in sustaining the demurrer the court below held that the statutes of limitations were decisive. (24 Idaho, 481.) From the averments of the bill and facts disclosed in its previous records concerning the controversy, the time when the term of the statutes commenced to run was determined by the court to be August, 1904, because on that date Kerns made a sale of a portion of the property embraced by the trust agreement and at the same time had bound himself to sell it all,—obligations which were held to be a repudiation by him of the trust agreement and in fact constituted a disclaimer of all obligation under it. It was held that by a suit brought in 1905, by which Cunningham was bound, it was judicially admitted that at that time there was a

default in carrying out the trust agreement on the part of Cunningham or those holding with or under him and a knowledge on their part of the disclaimer of all obligation by Kerns,—conclusions which caused the statutes to be operative since from the date of the starting point, 1904, to the date of the bringing of the present suit, in 1912, more than the statutory periods had elapsed.

Briefly stated, two propositions are relied upon, first, that causing the term of the statutes to commence to run from the year 1904 was a violation of the due process clause of the Fourteenth Amendment because at that date the corporation was not in existence and hence was without capacity to take and hold the property embraced by the trust agreement. Second, as the state statutes of limitations, generally speaking, did not run against minors or incapacitated persons, to cause the term to commence to run against the corporation before it came into existence and had capacity to take the property was a denial of the equal protection of the laws under the Fourteenth Amendment. But without in the remotest degree admitting that these propositions afford the slightest ground for converting such a purely state question as the operation of statutes of limitations upon real property situated in a State into Federal questions giving rise to jurisdiction of this court to review, there is obviously in any event no jurisdiction because in no manner and at no time were the alleged Federal questions, be they real or imaginary, presented or even remotely suggested to the court below. *Appleby* v. *Buffalo*, 221 U. S. 524, 529. In the argument this is admitted, but it is said the propositions ought now to be treated as adequate to confer jurisdiction because there was no opportunity to urge or suggest them in the courts below. Again, without conceding the merit of the suggestion if founded in fact, it is here plainly not so founded since the statutes of limitations which were upheld by the court below were in express terms stated in the

OLYMPIA MINING & MILLING COMPANY, LIMITED, *v.* KERNS.

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 495. Motion to dismiss or affirm submitted January 25, 1915.—Decided February 23, 1915.

This court has no jurisdiction under § 237, Judicial Code, to review the judgment of a state court, sustaining a demurrer to the complaint on the ground of statutory limitations, unless the Federal questions asserted as a basis for such jurisdiction were presented or suggested to the court below. *Appleby* v. *Buffalo*, 221 U. S. 524.

demurrer filed in the trial court and yet the record is silent as to any suggestion of assumed Federal right until after the decision below when the assignments of error were made for the purpose of a review by this court.

Dismissed for want of jurisdiction.